"Twenty Years in State's Prison"

THROUGH A JUDICIAL BLUNDER

. . . THE CASE OF . . .

ALFRED SCHWITOFSKY

THE STORY OF AN INJUSTICE
AND A PLEA FOR JUSTICE

By

REV. JACOB GOLDSTEIN

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"Vous me demanderez peut-être pourquoi je m'intéresse si fort à ce Calas qu'on a roué—c'est que je suis homme."

(*Voltaire's Correspondence.*)

מי שהאמת אתו הוא הרבים, ואפילו הוא לבדו

(*Ibn Masud—quoted by Arnold B. Ehrlich.*)

"He who hath the Truth on his side is the Majority—even though he stand alone."

"All that one owes to the Dead is the Truth."

(*Voltaire.*)

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Foreword.

When the recognised machinery for the administration of justice suffers a temporary break-down and fails to perform its functions properly there remains but one resource to the unfortunate victim of that failure—to appeal to the High Court of Public Opinion.

By the fact of your American citizenship and by the chance that this book is in your hands you, who read this, are constituted one of the Judges of that Court of Final Appeal.

An unhappy wretch, weak, friendless, poverty stricken, has suffered a grievous injustice and, from his prison cell cries to you for aid. Shall he cry in vain?

*If you are of the same faith as the writer you are reminded of God's direction: "Thou shalt pursue only justice * * * thou shalt judge the people with righteous judgment. Thou shalt not wrest justice."*

*If you are not of his faith you are reminded of the beautiful parable in your own Testament. When, hereafter, there shall be the separation of the sheep from the goats, if you can plead: * * * "and when we saw thee sick,* or in prison, *and came unto thee?"—then shall the King reply: "Inasmuch as ye did it unto one of these, my brethren * * * ye did it unto Me."*

Shall this cry, from the "least of these," be unheeded?

Read this book. Read it to the end, carefully and conscientiously. Here is no romance but a sad, true, hideous story of human frailty and human injustice. Every effort has been made to present a clear, succinct statement of facts, and to present it as soberly and dispassionately as may be. If I have not been always successful you will remember that a strong sense of abominable wrong done

has struggled for expression and may not always have been wholly repressed.

There will be found repetition of facts. This repetition is deliberate and has its special purpose. The statement is made up by contributions from different people each with his own view-point and his individual expression. Each repetition really shows a different facet of the central fact.

You are entreated to read to the very last word.

WE CHARGE:

That a well-to-do sexual pervert, of infamous character, and following his loathsome practices for years, had, for years, remained undisturbed by the police though he was notorious for evil-doing;

That when, at length, a sordid squabble with a young blackguard who ministered to his vices threatened him with exposure, under conditions which made it impossible for the police to remain blind any longer, the victim and companion of his vicious practices was seized and jailed on a charge—technically correct from the legal point of view but repugnant to common-sense and the common instinct for even-handed justice—which finally led to his being sentenced to a reformatory, not for the offence against public morals, *but for demanding payment of what, from his point of view, was due to him; his partner in wrong-doing, the complainant, going scot-free;*

That a companion of this youth, concerned in an attempt to bring the bilker to terms, after having created a great commotion and caused a public scandal by his attempt, escaped from the city; *and*

That the police arrested an unfortunate wretch, ENTIRELY INNOCENT of all offence in this matter, and fastened the crime on him;

That the accusations against their victim slowly grew in gravity until at length he stood threatened with a term

of imprisonment which would in all probability be shortened only by his death;

That this unhappy victim claims that the charge was deliberately fastened on him because he had incurred the enmity of certain police officials who knew that he was cognisant of certain irregularities on their part; for he had threatened to complain to their superiors of the irregularities;

That deliberate perjury was committed by the complaining witness—which perjury, aided by the mistaken identification by two bewildered and dismayed young women, and the total absence of any evidence in support of the statement of the accused, led to the judicial error of his conviction of crimes he did not commit;

That important facts, which would have positively convinced the jury of his innocence, must have been wilfully and knowingly suppressed by certain police-officers who could not have failed to be cognisant of these facts favorable to the accused;

That there can be shown reasons for viewing the statement of the victim in this affair, that certain police officers held a grudge against him, in a more receptive spirit than would be wise in other cases;

That the persistent, shrewd and thorough investigation made by Mr. Frank Marshall White, a very able *American newspaper man, well-known in three great centres of civilisation on two continents, whose impartiality and disinterestedness in the matter are beyond doubting —tends to show that not alone are there reasons for believing the victim's charges of police persecution in this instance but that he was most probably innocent in a former trial where the police secured conviction and sentence of this man for an offence committed by another.*

WE FURTHER CHARGE:

That this victim of malice, perjury and mistaken and

suppressed testimony was also the victim of impersonal folly and stupidity due to the defects of our legal system;

That he was tried before a judge whom it was unwise to entrust with the conduct of such cases;

That he was prosecuted by officers who refused to listen to any proffer of testimony favorable to accused;

That he was defended by indifferent and heedless 'assigned' counsel who seem to have been convinced that the accused was insane or an imbecile, mainly because of the apparently incredible nature of statements which were, nevertheless, true.

WE FURTHER CHARGE:

That this deplorable judicial blunder and the baffling opposition of our legal machinery to all attempts, so far made, to rectify the error prove that a condition of things exists which demands rectification;

That, for the public safety and in the interests of justice and civilisation, certain amending legislative enactments seem to be necessary;

That certain existing practices must, at all costs, be amended and reformed.

AND WE CLAIM:

That since we seem to have exhausted every recognised means, but one, *to secure justice for the victim and so far have failed:*

That the one remaining means must now be tried.

IT IS, TO PETITION THE GOVERNOR OF THIS STATE TO APPOINT A JUDICIAL COMMISSION EMPOWERED TO RE-TRY THIS CASE AND EVERYBODY CONNECTED WITH IT AND WITH POWER TO FREE THE INNOCENT AND PUNISH THE GUILTY.

And you are entreated to help this movement.

One last word. The plan of publishing this book and its issuing are the result of my own determination. I have not sought advice in the matter from anybody and where it has been spontaneously tendered—almost invariably taking the shape of discouraging the idea—it has been disregarded. I, *alone,* am responsible for the publication of this book. Nobody belonging to any organisation or establishment by which I am employed or with which I am connected can justly be charged with having had any hand in the issuing of this book. Without exception, those who may be deemed my "official superiors" knew nothing of my plan and will know nothing of it until this book is published.

JACOB GOLDSTEIN,

Rabbi, Temple Beth Sholom, Bensonhurst, and Jewish Chaplain Sing Sing & 'Tombs' Prisons.

175 Bay 29th St., Brooklyn.
25th September, 1913.

The Story of a Deplorable Judicial Blunder.

BRIEF ON APPEAL TO THE HIGH COURT OF PUBLIC OPINION.

THE CRIME.

On the morning of Thursday, the 19th day of January, 1911, Miss Nettie Palma, employee of Theodore B. Dale, a ladies' tailor who conducted his business at 71 West 45th Street, heard the street door bell ring. She opened the door and saw a man who announced himself as "the telephone man." She admitted him and went upstairs to the second floor, where the dress-making work was done. A little while later she was called downstairs by her employer, and there was the man, whom she had admitted, at bay. He was trying to leave the place, but Dale would not permit it. Dale called the colored maid, Anna Hart, and told her to stand at the door and prevent the man from leaving. The man drew a revolver, and pointing it at Dale, threatened to shoot. He turned and threatened Anna Hart also, who then let him open the door and go. As soon as he reached the street he ran, with Dale and Anna Hart pursuing him and calling for help.

Theodore B. Dale was a successful ladies' tailor who had amassed considerable money through his business, and who was well known in certain circles in New York City. It is well that, in order to understand all that follows, the reader should at once be apprised of the fact that Dale—who appears to have been a shrewd man of business and is said to have been otherwise quite mentally active, for he is reported to have read widely—was an unfortunate degenerate and moral lunatic. It has been

amply proved that for years he belonged to the unhappy class of creatures dealt with by Krafft-Ebbing in his "Psychopathia Sexualis." It has been established that he was a practitioner of unnatural sexual practices for fully twenty years. The writer has spoken to detectives and 'men about town,' who, while insisting on the suppression of their names and demanding a promise that they be not called upon to give evidence in the case, have assured him that Dale was one of the recognized leaders of an infamous coterie of evil-doers who have for years infested New York, and whose practices have given this city a reputation for moral vileness of which respectable New Yorkers will be ashamed to learn.

That Dale's practices must have been known to the detectives and plain-clothes men of our Police Force it is impossible to doubt. All this is emphasized at this point to account for the statement that what happened on the morning of January 19th in Dale's house cannot be definitely told, for Dale was alone with the pretended telephone man for a period of at least ten minutes, and we have only Dale's story as to what occurred. As will be seen shortly, Dale had very strong reasons for giving an untruthful account of what happened between him and the visitor. No reliance may be placed on his uncorroborated statement.

From the evidence of Miss Nora Murphy, another employee of Dale, whose duty is was to attend to telephone calls, it appears that someone had called up Dale's house over the telephone on the day before and stated that a telephone was to be put into the house next door, and that the company would have to cut off Mr. Dale's service for an hour in the morning. When the visitor appeared on the morning of the 19th she was upstairs, but after the lapse of time indicated previously she was called downstairs by Dale, who told her to inquire of the Telephone Company if they had really sent a man to fix the tele-

phone. An answer in the negative was given. She was sure that the man who was there was the man who had 'phoned, because she recognized the sound of his voice and because her interlocutor had spoken in broken English. The reader would do well, at this point, to turn to that part of "The People's Story" which contains the evidence of this young girl, where it will be clearly seen that, according to her own statement, she had not heard the man who was there on the morning of the 19th utter a word on that day.

A third witness was Anna Hart, a colored woman, maid or housekeeper in Dale's employ. She asserted that she saw the visitor as she was leaving the parlor when she was clearing away the breakfast things, and that he had a revolver in his hand with which he threatened her, and that in consequence she moved away from the door, which she had held shut at the direction of Dale, in fear. When the visitor ran away from the house she and Dale followed him.

Midway between Dale's place and Fifth Avenue a taxicab starter for the Hotel Webster named Frank Harold, caught the fugitive who was flourishing a pistol in his hand, grappled with him and wrested the weapon from his hand, holding the man thereafter until the pursuers came up. What happened in the crowd that soon collected can be gathered from the affidavit of Frank Harold and from the evidence given in "The People's Story."

Harold let the fugitive go and then "broke" the revolver he had wrested from him. He found, according to his affidavit, that the pistol only contained two blank cartridges. Harold later on handed over the unloaded pistol, exactly as he had taken it from the fugitive, to Detective Edward J. Cousin of the Thirty-fifth Precinct whose affidavit that he took the unloaded pistol with the two blank cartridges, from Harold, will also be found on a later page.

After Harold had freed the fugitive he felt a sense of discomfort at his finger tips. Taking out a pocket-knife he scraped from under his finger nails minute pieces of skin from the fugitive's wrist. As he states in his affidavit: "In the struggle between the said unknown man and myself I got hold of the wrist of the said unknown man, and my fingers scratched the left wrist and tore the skin thereon slightly. I am sure that the person whom I got hold of at the said time and place bore marks of the struggle, particularly the said back or outside portion of the wrist was injured and the skin broken."

Here then are two points of great significance in the case, depending on the evidence of two absolutely disinterested witnesses, Frank Harold the chauffeur, and Detective-Sergeant Edward J. Cousin. To these two points the attention of the reader is directed, and the reader is entreated not to let the following two facts of capital importance in the case escape his memory at any time.

One.—*That the man who called on Dale had a pistol which only contained two blank cartridges, the balance of the chambers being unloaded.*

Two.—*That the man who fled on that morning from Dale's door had the back of his hand plowed by the finger nails of Harold.*

It is true that Harold speaks of tearing the skin lightly, but the abrasion must have been much more serious, as the skin came away under Harold's finger nails. When Harold was personally interviewed he dwelt by no means so lightly upon the scratching of the skin. He observed that it would be easy to identify the man who was there, because he would bear the traces of his (Harold's) fingernails for some time to come. "I have often wondered why I was not called as a witness at Schwitofsky's trial," Harold also remarked. *In truth, it is a matter for amazement that these two facts of the unloaded pistol and the*

special marks which should have made identification so easy, should not have been brought out by the Deputy Assistant District Attorney, who must have had Harold's statement together with that of Cousin and the record at the Property Clerk's Office at Police Headquarters brought under his notice.

DALE IN ANOTHER CASE.

On the 30th of January, 1911, a young man named *Leo Gelsky* was arrested on a charge of attempted blackmail preferred by Theodore B. Dale, who was also complaining witness in the 'Schwitofsky case,' with which this book treats. The attempted blackmail was constituted by a statement, in a letter presented to Dale by a messenger from Gelsky on the date given, that Dale had committed (and the crime was described in the plainest of old Saxon English) a filthy variation of an unnatural offense on the writer (Gelsky) and in doing so had injured him. As a douceur, or payment for damage done, Gelsky claims that Dale gave him a promissory note for $100.

Gelsky, in the letter to Dale, claimed the payment of the $100 and threatened that in default of such payment he would lay the whole case before the District Attorney. The letter was forwarded through an Italian boy whom Gelsky met on the street, and to whom he gave a quarter to deliver the message. When arrested Gelsky admitted that he was the writer of the letter, and stated that the claim was a just one, and that if it had been for $1000 *he would have been entitled to claim that sum. Gelsky,* as the reader will see from his affidavit, *states that on the MORNING OF THE 19TH OF JANUARY, he sent a companion with the promissory note for* $100 *to collect the amount therein named. He had previously attempted to see Dale himself in the matter, but found that Dale's servants had been instructed to refuse him admission.*

He refuses to disclose the name of the man who was his messenger. Dale, he says, retained possession of the promissory note, drove the "collector" from the door and followed him, crying "Stop thief." Gelsky then recounts the story of the crowd, the holding up by the chauffeur, the Rabelaisian incriminations between Dale and the fugitive, and the freeing of the fugitive. Gelsky was sentenced to Elmira, to the last maintaining that he had not attempted blackmail, but that he had demanded a debt justly due to him. He was only half-hearted in his feeling of shame at the filthy nature of the relations between himself and Dale, but there never could have been a man who more stoutly maintained the moral justice of a demand for money than did Gelsky.

WHAT DID ACTUALLY OCCUR?

The reader will perceive that he has now reached a point when he will be asked to judge between the contradictory statements of Dale and Gelsky as to what actually occurred during the ten minutes when Dale and the fugitive, on the morning of the 19th of January, were alone together. The reader, on consulting "The People's Story" as told in the Court, will find that this is what occurred, according to Dale's statement.

On the 18th of January he saw Schwitofsky standing outside of his house in the company of another man. This other man had been to his house to apply for alms. When he first saw the defendant in the hall on 19th of January Dale had just left the dining room and had come out to go to the hall to get his overcoat. He saw the man standing on the sill of the hall-door where the 'phone was, with a piece of wire in his hand. His cook came and asked what the man was doing there, and Dale said he thought he was there to fix the telephone. He then put on his overcoat and walked to the stoop. From the door

he saw in the street the man who had been at his house on the previous day to ask for alms. He recognized him and then recognized, by association of memory, the man in the telephone booth. He went back and asked defendant what he was doing there. Defendant answered that he was there from the New York Telephone Company. Dale demanded a sight of his badge, and defendant answered, "Here is my book of instructions," to which Dale replied, "That won't do. I want to see a badge." Defendant said he had forgotten his badge. Witness then called Nora Murphy, instructed her to inquire of the Telephone Company whether they had sent the man, and when the answer "No" came back, he told the cook to guard the door while he went for a policeman. What followed has been told from the statements of the other witnesses.

In answer to questions by the Court itself, he said that he was only about three feet away from the defendant when he flourished the revolver, *and that he saw cartridges in it at the time the revolver was pointed at him.*

Was Dale telling the truth, or did the man who came there see *Dale alone* in the ten minutes to which Nettie Palmer testified as having intervened between her admission of the man and her being called downstairs again by her employer? This is really the crux of the story, and the reader's attention is strongly directed to this point also.

Dale, as shown by the events of December, 1912, and March, 1913, which are fully recounted later on, had his own reasons for coloring the truth. The writer has had made to him certain statements *which go to prove quite conclusively that Dale lied in his account of what took place.* The persons making the statements were, it so happens, so peculiarly in official relations with Dale, that, unless under oath in a Court of Law, they do not feel

free to repeat these statements publicly. The truth and the value of their evidence are beyond cavil. But in order to help justice and to clear up this disputed point they, with much reluctance and only after consultation with their superior officers as to the propriety of their making the statements, *went so far as to assure the writer that it was within their knowledge that Dale committed suicide in March,* 1913, because he was afraid that he would *be interrogated on the old story of his evidence against Schwitofsky, and that he would be forced to admit that he had committed perjury on that occasion.*

So far, then, as can be judged from the transcript of the evidence, the jury assumed that the *intention* of Schwitofsky (and, of course, they appear to have been satisfied that *he* really was the man who went to Dale's house on the morning of the 19th of January) *was to commit a crime,* and that in order to place himself in a position to commit the crime he gained admission under a false pretense that he was a telephone repair man. This gaining of admission under a false pretense by a man who intended to commit a *crime* after gaining entrance constituted the legal crime of 'Burglary in the Second Degree.' The jury also seem to have been satisfied that the pistol with which Dale and the colored maid are said to have been threatened was loaded. This constituted the legal crime of 'Felonious Assault in the First Degree.' Now, if it can be shown (and the writer is firmly convinced that this is the truth) *that the man who gained entrance on 19th January did so to collect a debt then nobody committed the Burglary in the Second Degree;* and if it can be shown, as the writer is firmly convinced is the truth, that the pistol, which is said to have been flourished in the face of Dale and the colored housekeeper, was unloaded, *then nobody committed the crime of Felonious Assault in the First Degree;* and if it can be shown that Alfred Schwitofsky's wrist bears no signs of the scars

caused by the digging of Frank Harold's nails into the back of the left hand of the fugitive when the pistol was wrested from him, then, *whoever it was* who entered Dale's house on the morning of the 19th of January, IT WAS NOT ALFRED SCHWITOFSKY.

THE ARREST.

On the night of the first of February, 1911, Officer William Brown of the Detective Bureau went to Mills Hotel No. 2 in Rivington Street and arrested Alfred Schwitofsky on suspicion of having committed burglary in the house of Dale on the 19th of January. Prisoner said, according to Brown's statement, "That's a mistake. I will accompany you to the complainant, and if the complainant identifies me, all right. I'll sue him." The detective then took his prisoner to Dale's house, where Dale identified him. Next morning he was charged before Magistrate O'Connor in the Police Court, and there identified positively by Dale and the three women in his employ. The prisoner sat among the audience, and each witness went over and placed a hand on Schwitofsky's shoulder and said, "That's the man."

This account follows the story elicited in the witness-chair from Brown who testified that the arrest was in consequence of information Dale had given him. Nothing in the testimony of Brown gave any indication of the nature of the information he received, or how it pointed to Schwitofsky, but we may take it for granted that Brown was on the lookout for a man, probably answering to the general description of Schwitofsky, who spoke with a foreign accent, who might be able to pass himself off as an electrician, and who had scars on his hand. Brown was recalled by Counsel for the Defense immediately after The People rested their case. It transpired that at the time of the arrest Brown had taken Schwitofsky

to Harold, the chauffeur, for the latter's identification. Brown was being cross-examined, as to why Harold examined the prisoner's wrists, when the Court intervened and stopped the cross-examination as being improper. We learn, however, that the police were looking for a man who had the scars of Harold's finger nail scratches on the back of his left wrist, but this point was not brought out clearly by either the Defense or the Prosecution before the jury.

Now—as the reader will learn from "The Prisoner's Story"—in 1908 while in the Tombs and mourning for the loss of his little boy, Schwitofsky, in his despair, had made a well-nigh successful attempt at suicide. He had taken a leaden spoon (such as are handed to prisoners in the Tombs with their food) had managed to turn the handle into a sharp-edged weapon, had tried to cut his jugular vein, and had opened the artery on the inside of his left wrist. The scars will probably be discernible on the inner surface of Schwitofsky's wrist and on his neck, to the end of his life, but what the police were, or should have been, looking for was a man who had *finger nail scratches* on the *back* of his *left wrist,* and not a man who had the *scars* of *knife-cuts* on the *under surface* of that wrist. The back of Schwitofsky's wrist at no time showed any scars of the scratches visible to the naked eye. The affidavit of Dr. Julius B. Ransom, Physician to Clinton Prison (to which Schwitofsky was transferred from Sing Sing) made in October, 1911, or *nine months* after the occurrences in Dale's house, declares that the Doctor has carefully examined under the microscope the left wrist, outer aspect with the palms upward, and also the back of the wrist, and finds that the outer aspect of the left wrist with *palm upwards,* shows some fine, radiating linear scars which were evidently made by a thin, sharp instrument and were of long standing, and that these scars, in his judgment, were not made within a

year previous to the examination. *He finds absolutely no indication of any scars on the back of either wrist or arm of Schwitofsky.* He also declares that in his judgment, as a physician of long standing, if the skin on the back of the wrist of Alfred Schwitofsky had been lacerated or broken, or in any wise injured, there would be signs noticeable under microscopic examination, *and that such scars would remain for at least five years. Ten months* after the occurrences, Dr. Ransom positively swears that there were no signs of any finger nail scratches on the back of the left wrist of Alfred Schwitofsky!

When first arrested Alfred Schwitofsky was held by Magistrate O'Connor, for Special Sessions, on a charge of "unlawful entry." He was afterwards transferred to General Sessions on a double charge of burglary in the second degree and felonious assault in the first. Brown, when under examination at the trial, was cross-examined as to why the Magistrate had not held the accused on the more serious charges, to which he somewhat truculently replied that he had arrested defendant on the charge of burglary and not of unlawful entry,—that he did *not* tell prisoner that the charge was unlawful entry. It is true that the complaint was drawn up as 'unlawful entry,' but he, Brown, was not responsible for the mistakes of the Court. In spite of Brown's contempt for the processes in the police courts of this city it is impossible to believe that the evidence given before the magistrate (of which the writer has not been able to secure a transcript) was of such a nature as to point to the commission of serious offenses. The writer feels justified in concluding that, when Brown first arrested Schwitofsky, he had no idea of the statements afterwards made in the higher court. There is quite ample reason for not peremptorily rejecting Schwitofsky's story that the complaints against him were increased in magnitude as

time went on, without his having any idea of the reasons for this cumulation of gravity.

AWAITING TRIAL.

Schwitofsky was transferred from Special Sessions to General Sessions on February 9, 1911, and the new indictment charged him with the commission of the crimes charged, *as a second offense.* As will be seen from "The Chaplain's Story," the prisoner had counsel assigned to him by the Court in the person of Mr. William D. Bosler. Schwitofsky states that he told his story fully to the Counsellor, and asked him to secure the necessary witnesses to prove his alibi on the 19th of January, but he says Bosler replied, "What, do you think I am going to spend my time and money on your case when there is nothing in it for me? I shall defend you as an officer of the Court whenever you are going to be tried." Mr. Bosler, who was a former Deputy Assistant District Attorney, is a young gentleman of experience and ability, and while it may possibly be true that he did not speak in the brusque manner indicated by Schwitofsky's quotation, it is quite within the bounds of probability that he did say that he had no means of procuring the required evidence, and that it would be impossible for him to spend any considerable amount of money or time on the defense, for the conduct of which he was not receiving anything; that he was only acting as an assigned officer of the Court, and without pay.

It is a peculiar thing, and well worthy of remark at this point, that the average prisoner in the Tombs is firmly convinced that all assigned lawyers are well paid for the defense. They think that these appointments are made by the State and generally refer to an assigned counsel as a "State Lawyer." The truth is that counsel assigned for the defense are in no position, unless they have the benevolent attitude and the means to spare, to spend any

money in securing evidence for the clients referred to them in this manner by the courts. Doubtless, also, Schwitofsky's manner was as nervous and excitable when speaking to his attorney as it was when speaking to the chaplain and the journalist whose stories follow on a later page.

The fact that one of the first striking points in his story was that he had quite recently been released from Mateawan was an additional reason for paying no great heed to his protestations.

Counsellor Bosler reported to Judge Warren W. Foster that, in his opinion, Schwitofsky was not sane and applied for a Commission in Lunacy. A report was called for by Judge Foster from the prison physician and Mr. Dan E. Kimball of the Prison Association, and these gentlemen reported that they saw no grounds for the appointment of the commission. Judge Foster, therefore, denied Bosler's request. Later on the case of Schwitofsky was referred to the court presided over by Judge Thomas C. O'Sullivan, and Mr. Walter H. Carpenter was assigned by Judge O'Sullivan to defend the prisoner, as Mr. Bosler was prevented by illness from attending to the case. Counsellor Carpenter promptly renewed the application for the appointment of a Commission in Lunacy. This time the application was granted by the late Judge O'Sullivan. The Commission held its inquiry and reported Schwitofsky to be sane.

The case finally came up for trial on June 1, 1911, or exactly four months from the date of the arrest of Schwitofsky. Counsellor Carpenter was assisted by Counsellor William G. Kier for the defense. Schwitofsky had been very much dissatisfied with Carpenter's attitude, and had applied to the Judge for the appointment of other counsel. He complained that it was not till a few days before the trial that the counsellor called on him, and on Schwitofsky's objecting to what he claims was the indif-

ference displayed by Carpenter, Counsellor Kier entered in the case. He says that Kier paid him one brief quarter-hour visit on the first occasion, and then made an appointment to see him on the day before the trial. Kier, however, did not keep this appointment and went to trial without any further consultation with his client. The truth seems to be that everybody in the Court by this time appears to have been convinced that while Schwitofsky was not legally insane, he was nevertheless so unreliable that no attention need be paid to his protestations, and counsel seem to have decided to content themselves with fighting the case as presented by the People.

THE INDICTMENT.

On the 9th of February, 1911, the Grand Jury of the County of New York indicted Alfred v. Schwitofsky, otherwise called Alfred Gerber, for the crime of Burglary in the Second Degree as a Second Offense, reciting:—

"That on the 11th of July, 1910, the said Alfred Schwitofsky was convicted before Judge Edward Swann of the Court of General Sessions, in the County of New York, of the Felony of Burglary in the Third Degree, said Burglary being constituted by his entering with force and arms the dwelling-house of Elma J. Ellsworth on the 19th of February, 1908, and did burglariously steal, take and carry away chattels and personal property of the said Elma J. Ellsworth; that upon the conviction of the aforesaid, the sentence was suspended;

"And that the said Alfred V. Schwitofsky did on the 19th of January, 1911, obtain an entrance to the dwelling-house of Theodore B. Dale by fraudulently pretending and representing that he was a servant and agent of the New York Telephone Company, and by this fraudulent pretence did feloniously and burglariously enter the dwelling-house of Theodore B. Dale, there being human

beings within the same, and with intent to commit the crime of feloniously and burglariously stealing, taking and carrying away the goods, chattels and personal property of the said Theodore B. Dale."

And the Grand Jury aforesaid did also further indict the said accused of the crime of Assault in the First Degree, as a Second Offense, reciting:—

"That the accused having been formerly guilty of the felony of Burglary in the Third Degree first mentioned, did on the 19th of January, 1911, enter the dwelling-house of Theodore B. Dale situated in the Borough and County aforesaid, by means of the artifice used for that purpose as described in the first count, with the object of burglariously stealing and carrying away.

"And having so entered said building with force and arms, feloniously did make an assault to, at and against one Anna Hart, by holding in his right hand a certain pistol loaded and charged with gun-powder and one leaden bullet, which he did then and there point, aim and present with the intent to wilfully and feloniously kill the said Anna Hart.

"To all of which A. H. Eppstein, Foreman, did certify that a "true bill had been found."

THE TRIAL.

The reader will find in a later portion of this booklet all the evidence presented by the People edited in narrative form, the writer considering that the average reader will find it easier to peruse in this form than to follow the tedious method of question and answer with which the evidence is, according to the custom of our courts, recorded. The reader will observe at certain places, asterisks marking the evidence. Whenever such asterisks occur they record the taking of an objection by counsel for the defense.

The witnesses for The People were Nettie Palma, Nora Murphy and Anna Hart, all in the employ of Theodore B. Dale, and the complaining witness, Theodore B. Dale himself; together with Officer William W. Duggan, who was called to testify to a previous conviction and suspension of sentence before Judge Swann; Edward Denahm, who was called to testify that the accused had never been in the employ of the Telephone Company; and Detective William Brown, who testified as to the arrest of Schwitofsky. For the defense the accused himself was the sole witness.

The reader is asked to read Schwitofsky's evidence with the utmost care. He will find it extremely confused. According to his statement already repeated, neither of the counsel for the defense had taken the slightest notice of his own story. An ill-educated foreigner, fully conscious of the gravity of the charge against him, unable to secure credence from anybody officially connected with the case to his loud and almost hysterical declarations of his innocence; feeling himself entrapped within the dangerous machinery of the law; in no position to know exactly what was to be charged against him and what evidence was to be presented,—there is little reason for wondering that many of his statements were incoherent, irrelevant and confused. The Court itself appears not to have been well disposed towards the prisoner, for Judge O'Sullivan had been harassed by the receipt of many long-winded letters from the accused, had been annoyed by the accused's constant, and, probably to his mind, unreasonable objections to the counsel assigned, and had undergone the experience of receiving communications from benevolent workers which might have the tendency to set up in his mind an undue prejudice in the case in favor of the prisoner.

One other point with respect to the late Judge O'Sullivan must be noted for the benefit of those who did not

have a personal acquaintance with the Judge. The writer refers to this point with the greatest possible reluctance, and is only induced to do it by a feeling of necessity, and the obligation to omit nothing which can give the reader a clear view of the whole conditions of the trial. The writer as Chaplain had often met Judge O'Sullivan and conversed with him with respect to a number of other cases of Jewish defendants. Judge O'Sullivan always displayed himself as a fair-minded and kindly man, prepared to take unusual pains to reconcile husbands and wives in cases of abandonment, and to investigate thoroughly any doubtful points in cases where the accused had pleaded guilty, and where a more intimate knowledge of the facts than that displayed in the indictments might lead the judge to lenient action. But it must needs be said that the late Judge O'Sullivan had physical and temperamental weaknesses which very probably helped in the miscarriage of justice to which public attention is now called. Judge O'Sullivan was very hard of hearing; it is alleged that he was quite deaf in one ear. The Judge is believed to have been quite blind of one eye. In early youth an arm had been torn out of the shoulder socket. These physical disabilities (which would have prevented Judge O'Sullivan from serving on a jury) were minimized by the judge's known determination to let no action or statement pass in his court without his fullest cognizance. Nevertheless, many a thing must have been said and done in the court of which His Honor, with all his watchfulness and care, could not have been cognizant. It is known that when Judge O'Sullivan first took his seat on the bench objection was made by officers practising before him because of his tendency to extreme irascibility.

If the reader will now picture to himself the position of Alfred Schwitofsky and remember how much in this case, above all other cases, depended on the alertness,

mental and physical, of the judge, he will realize how the unhappy accused appears to have had the very "stars in their courses" fighting against him. The examination and cross-examination by his own counsel and by the Deputy District Attorney were conducted in an extremely patronizing and significant manner. The methods of addressing him by his own counsel must necessarily have conveyed to the jury the impression that the examiner had no faith in the sanity, and consequently in the truthfulness, of the accused. To put it briefly, owing to the many peculiar conditions here described, any one who had the slightest personal interest in Schwitofsky or any faith in the possibility of his innocence must have felt a sense of extreme dissatisfaction with the conduct of the trial.

THE SENTENCE.

The jury returned a verdict of "Guilty," and Schwitofsky was sentenced on the 5th of June, 1911, four days after the trial, to twenty years imprisonment. When sentencing the accused Judge O'Sullivan stated in unmistakable terms his opinion that the accused belonged to the class of men who should be kept in jail for life.

About twelve days elapsed before the Judge signed the commitment papers which would authorize the transfer of the accused from the Tombs to Sing Sing Prison. During this period the prisoner communicated with the writer of an article in the *New York Herald* which described conditions in the Tombs. In response to Schwitofsky's written request, Mr. Frank Marshall White, a very prominent journalist of New York, visited him. Mr. White, struck by the story told by Schwitofsky, entered upon an independent examination of the whole affair. He called after the lapse of some time on Judge O'Sullivan. Here is Mr. White's account of his visit to the judge, as given in an article on the case published on January 13, 1912:

"All things considered, I felt justified in laying before Judge O'Sullivan, the information I had gathered with regard to Schwitofsky. *I found that the Judge was cognizant of all the circumstances, if not of their bearing on each other.* 'Schwitofsky was found guilty after a fair and impartial trial,' O'Sullivan told me, 'and a sentence of twenty years is the lightest I could impose on him.' "

It is almost inconceivable how such a statement could have been made by the Judge, and had the writer any less reliable authority than that of Mr. White he would feel disposed to take the liberty of questioning the truth of the quotation. But the writer knows Mr. White so well that any doubt of his honesty or carefulness of statement becomes an absurdity. When the late Judge O'Sullivan made that statement to Mr. White he stated what was only true in a tricky sense, but what, *in fact,* was untrue. The sentence of twenty years on Schwitofsky was not the lowest sentence the Judge could have imposed, but was the maximum sentence, that is, double the lowest sentence imposable in the case. It is *not* an uncommon thing for juries to convict accused on two or three counts in an indictment, all the counts rising out of the one crime. It *is* an uncommon thing for a judge to sentence on each. The usual and humane practice, when the counts in an indictment all arise out of the same offense, is to sentence the accused on the more serious count and ignore, for the moment, the other counts, or, if the other counts are revived later on, to suspend sentence on them. The lowest sentence, according to the law, which the Judge could have imposed on Schwitofsky was *ten years,* and not twenty.

THE APPEAL.

Those who had doubts of Schwitofsky's guilt were startled, in some instances horrified, at the severity of the sentence, and although they had to oppose the whole

stately and powerful machinery of the law in this County, and were men without any influence except that which is given by the desire to perform a duty, they set themselves resolutely and quietly to fight the case. It was at this point that Mr. White, whose story is published hereafter, did such splendid yeoman service in the cause of justice. He set himself the task of hunting down and interviewing every man who could throw any light or give any information with respect to the crime charged by Dale. Not content with that, he investigated the facts connected with every other charge made in this county and state against Schwitofsky. Mr. White did not content himself with merely interviewing people—it was he who secured the affidavits published on another page from the prisoner, from Leo Gelsky, Frank Harold, Edward J. Cousin and Dr. Julius B. Ransom.

When the case for Schwitofsky was considered as complete as the limited means at the command of Schwitofsky's friends permitted, Mr. White called with all these proofs on Deputy Assistant District Attorney Robert C. McCormick who tried the case, and placed before him the results of his investigation, showing him the affidavits he had secured. Mr. McCormick, Mr. White reports, very nobly and generously said that, in view of this evidence, the District Attorney's Office would not oppose the proposed application for a new trial, on the grounds of newly discovered evidence. "It is the duty," he said, magnanimously, "of this Office to Help to Save the Innocent, as much as it is to Prosecute and Punish the Guilty." Mr. White was greatly encouraged by this noble attitude on the part of the representative of the District Attorney, and when Counsellor K. Henry Rosenberg very kindly undertook to prepare, without charge, all the necessary papers and argue the appeal before Judge O'Sullivan, he went into court cheered by the feeling that his task would be light, as his application would receive the support of

the District Attorney. Imagine then, the amazement and consternation of the friends of Schwitofsky when Mr. McCormick arose and argued vehemently against the granting of the appeal. So intent was Mr. McCormick on preventing the court from acceding to the application made on behalf of Schwitofsky, that he allowed his enthusiasm to lead him into very considerably overstating the number of convictions recorded against Schwitofsky.

The Appeal having been argued by counsel for the prisoner and opposed by the District Attorney's office, the Court accepted the affidavits and announced that it would take time for consideration of the application. Some seven weeks intervened between the application and the decision which *denied the Appeal.* During these seven weeks the writer had an interesting conversation with Mr. McCormick, who told him that the judge had referred all the affidavits in the case to the District Attorney's office for investigation and report. When the writer asked Mr. McCormick how, in the face of the conclusive nature of these affidavits, he could oppose the application, his reply was an invitation to the writer to come to his office and see all the evidence the District Attorney had secured. The writer's reply was that he had long before procured a transcript of all the evidence and was intimately acquainted with every word uttered at the trial. "Our identification," said Mr. McCormick, "is so perfect, that nothing can shake our case. We ground our attitude on the unassailable completeness of the identification." The writer replied, "Well, let us grant, for the moment, that Schwitofsky was the man who entered Dale's house on the morning of the 19th of January, 1911, and that the conviction on the count of burglariously entering can be upheld. But how do you account for the fact that the conviction for felonious assault in the first degree cannot stand for a moment as it has been shown that the pistol,

which the man who entered Dale's house flourished, was unloaded?'' Mr. McCormick looked surprised at this statement and said, ''Is that so?''

It is possible that Mr. McCormick will have no recollection of this fact, and will deny that the conversation just described took place, or that it took the form indicated, because, when on a later occasion, again discussing the case, the writer asked Mr. McCormick how he accounted for the fact that when Mr. White first called on him he promised that the District Attorney would not oppose the application for a new trial, and how he could reconcile that promise with the fact that the District Attorney did most strenuously oppose the application, Mr. McCormick replied, ''Why, White lied to me. I did not read the affidavits, but I took his statement of what they contained for granted.'' It was intimated to Mr. McCormick that Mr. White does not lie, and since the memorable occasion on which Mr. McCormick thus defended himself, all personal intercourse with that high-minded gentleman has been avoided by the writer. Mr. White declares that if Mr. McCormick did not read the affidavits he made an admirable pretense at doing so, for he took each affidavit into his own hands, appeared to read each page carefully, with all the manner of a man who was absorbing the contents, and it was only after he returned the affidavits to Mr. White that he made the noble and virtuous declaration which so encouraged the defenders of Schwitofsky.

THE APPEAL DENIED.

In denying the Appeal, Judge O'Sullivan's 'Opinion' recounts the story of the occurrences at Dale's house on the morning of January 19, 1911, and the testimony of various witnesses which showed that the defendant ''taking a loaded revolver from his pocket said, 'You won't let me out; you won't? I'll shoot you if you don't let me

out,' " and that he threatened several persons in this way. The story of the flight of the man and his being held by the chauffeur, etc., is repeated. The learned Judge goes on to say: "The Defendant's motion is based on alleged newly-discovered evidence as to identity, *on the theory that certain scars on his wrist were relied upon to a material extent to prove his identity as the actual offender.*" The Judge then dwells on the fact that there were four witnesses, Dale himself and three of his employees, who swore to the identity of the Defendant. All four declared that they recognized the defendant and were positive in their testimony as to the identity of the defendant. The Judge then repeats Schwitofsky's statements as to his arrest, and goes on to say:

"On re-cross-examination the Attorney for the prosecution asked the defendant, 'Now, the reason the chauffeur wanted to look at your wrist was that at the time he stopped you your wrist was cut by his nail, wasn't it?' To which the Defendant answered, 'No.' Thereupon, the District Attorney asked, 'Well, what did he want to look at your wrist for?', and the Defendant answered, 'He wanted to look at my wrist and examined my wrist, and then he shook his head.' "

The Judge referred to the fact that the foreman of the jury questioned the defendant about the scar on his wrist and asked him how he came by it and that defendant answered that he inflicted the injury upon himself in the year 1908. "After the closing arguments had been made," said the Judge, "and while the Court was charging the Jury, he was interrupted by the Defendant's Counsel, who stated that the Defendant desired to make a statement to the Jury regarding the mark upon his arm." This request was denied. The Judge continues, "*Three of the affiants,* whose affidavits are part of the moving papers, *were accessible at the time of the trial and their testimony could have been procured.*" "I do not

believe,'' continued the Judge, ''that any additional testimony by them would have changed the verdict of the Jury, nor would testimony of the microscopic examination of the scars three years after they were made have that effect.'' The Court found nothing to justify the granting of the motion for a new trial, and therefore denied it on the 23rd of February, 1912.

The learned Judge, the reader sees, like Deputy Assistant District Attorney McCormick, based his opinion of the justice of the sentence on the identification of Schwitofsky at the trial.

THE IDENTIFICATION.

The identification of accused persons generally is one of the most perplexing of the questions which practitioners of law in the Criminal Courts have to encounter. Many scores of cases throughout the world are recorded, in which there has been the most positive identification of accused by numbers of witnesses, all honest and well-meaning, and in which later developments have shown that the identification was mistaken. Now, it would be well to analyze the identification in this case.

Nettie Palma states that she opened the front door of the house in answer to a ring of the bell; that she saw a man who said he was the telephone man; that she admitted this man and then went upstairs; that ABOUT TEN MINUTES LATER she was called downstairs again and there saw the man threatening to shoot first Mr. Dale and afterwards Anna Hart. She further swore that she saw the man run down the length of five houses towards Fifth Avenue on the opposite side of the street, and that then he ran back towards Sixth Avenue; that Anna Hart and Mr. Dale were only a few feet behind him; that Mr. Dale was shouting for help; *that nobody stopped the fugitive,* who turned to cross the street again and, in doing so,

dropped the revolver and then ran towards Sixth Avenue and jumped on a car. There was another man with him. The next time she saw the defendant was up at 57th Street in the Court. Under cross-examination she persisted that she saw defendant drop the revolver, and that a detective picked it up. She said that she had not probably talked to him more *than a second or two* when she admitted him. Asked whether she had any doubt as to whether defendant was the man she saw at the house, she said, "No," that she was sure that that was the man. She only saw the man for a few seconds in the first instance, and then saw him again under conditions which, to a young girl like her, were so exciting and bewildering that she had no clear recollection of what actually occurred, for as the reader knows, the fugitive did *not* drop the revolver, nor was he allowed to make his escape, to the car on Sixth Avenue, unimpeded.

This witness unquestionably intended to tell the truth, but what she actually saw (if she really was in a condition to observe anything at all, and was not in such a state of fright and consternation that she was unable to remember clearly what took place) was the man *being stopped by the chauffeurs, the struggle between the fugitive and Harold,* the *gathering of a big crowd and the release of the man after the occurrence of quite an exciting scene,* all of which seems to have left no impression whatever on her memory. The next time she saw the man was fifteen days later in the Police Court.

The identification by Dale may be at once dismissed from the reader's attention in the light of the developments two years later, which, of course, were unknown to the Court at the time that the Appeal was denied. Nevertheless, the Court had before it, not in this case truly, but in another case (and its attention had been directed to that important point by the Jewish Chaplain) clear and unmistakable evidence that Dale had been

charged with the practice of a hideous offense against morality, and that there was a strong probability that the two cases were intimately connected. The writer is not prepared to say how far the Judge would have been justified by the practice of the Courts in insisting on the connection of the two cases. This might have been legally improper—although there may be room to doubt that. But surely humanity, justice and common-sense dictated that the point should at least have been investigated during this trial! Had that point been brought out, does any thinking reader imagine that the Jury would have attached any great weight to Dale's testimony? Dale's evidence should then unquestionably be dismissed as unworthy of credence.

The judge had dealt with the charge against Leo Gelsky. He must have been aware of the circumstance of the alleged connection of Gelsky's case with that of Schwitofsky. Why was this point not investigated?

The next witness was Anna Hart, the colored maid, housekeeper or cook. Her evidence was simply that she went from the breakfast room where she was clearing away the table into the middle parlor, and there she was asked to hold the front door and prevent a man from going out. She declared that he pulled a revolver out of his pocket, "drew it in her face twice," and threatened to shoot her. The period elapsing for this occurrence she places at two minutes. She declares that he pointed the revolver at her twice and then at Dale. It is not of much importance but the other evidence is that the revolver was pointed first at Dale and then at her. Quetsioned as to the identification, she said that the man she saw had no particular marks which she noticed, but that he did not have at that time the mustache which Schwitofsky wore at the trial. She said positively, "I knows him, anyhow. I knows that's the man that pointed the gun in my face; I knows that."

The writer would be very sorry to do any injustice to Anna Hart, but if she had been any length of time in Dale's employ she must have had some suspicion, or knowledge, as to his habits; and, with due respect to the lady, the fact that after such knowledge or suspicion she could remain in his employ might tend to weaken the value of her testimony, in the minds of, perhaps over-nice, people.

The last witness who positively identified the man was Nora Murphy. She is a young girl who was employed in Dale's dress-making establishment, and there is no desire to impeach in the slightest degree, her character or truthfulness. What she said she saw and believed was really what she thought she saw and really did believe. But she was upstairs when the pretended telephone man came in, and was called downstairs by Dale, who directed her to go to the telephone booth and see if they had sent a man to fix the 'phone. She 'stepped into the booth,' 'phoned, and got her reply to the effect that they had not sent a man. After she left the telephone booth she did not see anything more. Everybody had left the house except Nettie Palma, and she was standing in the hall. That was all she knew about it. "But," she went on to say, "he," the defendant, " 'phoned the day before." To the question as to how she knew he was the same man she said she *recognized the voice.* The man over the 'phone asked if that were Mr. Dale's house, and said they were going to put a telephone in the house next door, etc.

Now follows the most extraordinary bit of cross-examination by defendant's counsel, which adorns the records of our criminal courts. The reader will note that there is never the slightest hint that she heard the accused utter a sound on *the morning of the* 19*th. According to her own story she had not heard him say a word.* Mr. Kier asked, "And this conversation over the 'phone the day before was with somebody you believed was the defendant

because it sounded like his voice." Her answer was, "Yes, he spoke broken English." The next question was, "And then you believe it was this defendant because he spoke broken English. Do you?" Her answer was, "Yes sir."

Here the reader will see that the Defendant's own counsel is so heedless as to create, in the minds of the Jury, an impression that she heard the man speak in Dale's house, which her own previous testimony shows not to have been the case. Then this clever cross-examiner moved to have the testimony stricken out. Upon which the Court asked the witness, "In addition to the broken English, you say that you recognized the sound of his voice." Her reply was, "Yes sir." Seeing that the witness had never referred to the quality or sound of the prisoner's voice, this may be described as a very 'leading question.' The Court denied Mr. Kier's motion to strike out the testimony.

There was sharp discussion between Counsel on both sides and the Court, in the course of which Mr. Kier moved for a mistrial. This was denied, but the Court directed that the conversation *over the telephone* be stricken out, and that the jury disregard it entirely. It will be seen, however, that the absolutely *false* impression that Miss Murphy recognized Schwitofsky because she had heard him speak on the morning of the 19th and recognized his voice as that of the man who spoke on the afternoon of the 18th, was left undisturbed on the minds of the jury.

The truth of the matter may be that these two young ladies positively swore to Schwitofsky as being the man *whom they saw on the morning of the 19th,* whereas in reality they—quite unconscious of the distinction between the facts—*recognized him as the man they saw in the police court fifteen days after the occurrences in Dale's house.*

Brown, the arresting officer, swore that on the morning of the trial in the police court before Magistrate O'Connor, the prisoner was placed on one of the benches in the court-room and the three female witnesses each went across to where he sat in the audience, placed a hand on his shoulder and said, "That's the man." He also swore that the accused was brought direct from the prison and placed in the audience. At that time the witnesses were in an inner room called the "Complaint Room." They could not see him from that room.

On the other hand, Alfred Schwitofsky swore to the following effect:

"I was taken to the 57th Street Court and placed in the pen. In a short while a young fellow came downstairs and was brought down by the same two officers, and one of them shoved him on the side with his hand like that (illustrating), and he said, "Go ahead—say it," to the other fellow, and the other fellow started in to cry and said, 'Yes'." It would seem that the 'young fellow' referred to, was Gelsky. Schwitofsky continued, "And from there I was taken into the back room and charged before the clerk of the Court in the back room on a charge of unlawful entry." Being asked whether he saw the three women witnesses at the side of the room at the entrance, the reply was, "I never knowed them, who they were, or anything else." To the question, "Are they the three women that appeared here", the answer was, "Yes sir, those are the three, two white women and a colored woman. They were seated right there. When the clerk in the back room asked me if I plead guilty or not guilty, I pleaded not guilty, and I had to sign my name there, and I was taken to the corridor to wait to be arraigned before Magistrate O'Connor."

His counsel said, "Now, tell about the identification by these three women. Where were they when they came in and pointed you out?" Schwitofsky answered, "They

did not point me out at all. They never came over to me." "Now," said the lawyer, "you heard the officer, Alfred, testify that you were placed in the audience." Schwitofsky interrupted, "No sir, that's a lie." "Wait a minute," said the lawyer, "that you were placed out in the audience, that these three women were called in and went up near you in the audience and pointed you out; is that so or not?" "No sir, it isn't so. Nothing like that happened." Counsel asked, "Were you placed in the audience,—wait a minute, I want to get the question—were you at any time up there placed in the audience at all?" Schwitofsky answered, "No sir. Never was placed in the audience; never was pointed out; never saw a hand put on me by any of the women." Under cross-examination by the District Attorney's representative he again denied Officer Brown's statement as to the identification.

The present writer, knowing something of the methods of the police, is strongly disposed to believe Schwitofsky's story of identification rather than that of Brown. The reader will do well to study "The Journalist's Story" at this point. It is a common thing for police officers to manage to suggest or indicate the person, whom they wish identified, to the witnesses, who, after the lapse of time that usually occurs between the commission of an offense and the arrest of the accused, have no really clear recollection of the person who committed the offense, and who, quite unconscious of the fact that their identification is from the suggestion of that moment and not the clear recollection of the features and appearance of the person who committed the crime, stoutly swear to the identification of the accused, and persist in their faith that their identification is righteous to the end.

In view of all the circumstances then, it may be said that this positive identification on which the District Attorney's Office and the Court placed so much stress, is in this case quite unreliable. Dale's evidence must be dis-

missed from consideration, for there is no doubt that he committed willful perjury in this case. The identification by Anna Hart, the colored cook, may, under all the circumstances, also be held to be inconclusive. As has been shown, both the other young girls, who are unquestionably honest witnesses, and who had the fullest intention only to testify to the truth, were so confused and disturbed by the extraordinary occurrences in Dale's house on the morning of the 19th of January, that their testimony is unreliable.

APPELLATE COURT.

Surprised and disconcerted but not dismayed nor daunted by the unexpected result of the appeal to Judge O'Sullivan, the defenders of Schwitofsky resumed their work of proving his innocence. Mr. Francis D. Gallatin, a high-minded and able lawyer, was induced to appear as Schwitofsky's Counsel, and drew up an admirable and clear brief on Appeal, and Mr. Samuel Untermyer, the famous New York lawyer and one of the leading lawyers in this country, very kindly undertook to argue the case. On Wednesday, March 19, 1913, the appeal, both from Judge O'Sullivan's decision to deny the new trial and from the verdict at the trial, was argued in the Supreme Court, and on the 4th of April following, the decision was handed down denying the Appeal. There was one dissentient, but as no opinion was given either by the Court itself or by the dissenting Justice, the public has no means of arriving at any knowledge of the grounds on which the Appeal was denied, or the grounds on which the dissentient disagreed with his brothers. It must, however, be observed that since much that has come to the knowledge of Schwitofsky's supporters had come to light only after the lapse of the twelve months in which the law recognizes newly discovered evidence, much that

is quite convincing could not be brought before the Appellate Division.

THE NEWLY DISCOVERED EVIDENCE.

When denying the first appeal, Judge O'Sullivan briefly dealt with the newly discovered evidence, and pointed out that most of his 'newly discovered' evidence was accessible at the time of the trial and could have been procured. The learned Judge, however, did not point out *by whom it could have been procured.* The unfortunate Schwitofsky had sent him letter after letter, certainly ill-spelt and somewhat hysterical in tone, but nevertheless clearly stated, in which he complained that the counsel assigned by the Court positively refused to pay any regard to this evidence. The poor fellow was entrapped in a *'vicious circle'* of unyielding legalities which deprived him of any chance of receiving justice. Miserably poor, he had no means to engage counsel, and had to accept counsel assigned by the Court. Two of the three so assigned immediately concluded that the man was mad, and the third treated him, even in court at the trial, in a manner which suggested his belief that the man was irresponsible and semi-imbecile. Mr. Bosler, if Schwitofsky is to be believed, and there is no particular reason for doubting his statement, told him that he was in no position to spend time and money in hunting up these witnesses, so that the poor fellow was not merely ill-defended, but the failure of the counsel, *assigned by the Court,* to do him justice was held by that Court to be a reason for denying him any further hearing. When Schwitofsky indignantly remonstrated at the attitude of the assigned counsel and demanded the substitution of other counsel, he appears to have angered the Court. The Court said, "In my opinion, the defendant was fairly tried. Two reliable and experienced attorneys were

assigned to the defendant by the Court. They had ample time to acquaint themselves with every phase of the case, and I believe were familiar with all the facts and circumstances, and could have adduced the testimony upon which it is now sought to obtain a new trial."

It is to be remarked that the Court did not impugn the value and importance of the new testimony, but regarded the fact that "the two reliable and experienced attorneys" did not adduce it, as sufficient reason for denying it any attention. It may, of course, have happened that if the affiants, whose affidavits formed the ground-work for the motion for a new trial, were put under cross-examination, that operation might have resulted in weakening the force of their testimony. But here is a witness who swears that he was beaten by the police into identifying Schwitofsky as the man he sent to Dale's house on the morning of the 19th of January, whereas Schwitofsky was not the man he sent. Here is Frank Harold, an absolutely disinterested witness, who swears that the fugitive whom he stopped on the morning of the 19th must have on the back of his left wrist, the scars of scratches made by his, Harold's, finger nails, and who also swears that the pistol he took from the fugitive was unloaded. Here is Detective-Sergeant Edward J. Cousin, who swears that he received the said pistol from Harold on the morning of the occurrences, and that it was then unloaded. Here is Dr. Ransom, who swears that he has made a microscopical examination of the back of Schwitofsky's hands, and finds no marks of any finger-nail scratches. None of this evidence was brought forward by the 'reliable and experienced' attorneys at the trial, though, if they had done their plain duty not merely as lawyers but as conscientious human beings, they should have brought it forth. How vicious must be that legal system which leads to the suppression of important evidence in favor of an unhappy wretch, accused of a crime of which he is innocent, while

a wealthy city provides tremendously effective machinery for prosecution, with unlimited powers, funds and assistants, which, in such a case, becomes a terrific instrument of oppression and injustice! And when a few disinterested workers take up the cudgels for the victim, and at their own expense of time and money provide the missing proof of innocence, the Court will pay no attention because:

1. A certain time has elapsed, and therefore the Court cannot listen;

2. Because officers assigned by the Court heartlessly neglect to take the least trouble to procure the evidence in proper time.

THE SCARS ON THE HAND—THEIR SIGNIFICANCE.

In his 'Opinion' denying the motion for appeal Judge O'Sullivan said: "The defendant's motion is based on alleged newly-discovered evidence as to his identity, on the theory that certain scars on his wrist were relied upon to a material extent to prove his identity as the actual offender."

This passage displays a singular and almost inexplicable misconception on the part of Judge O'Sullivan as to what importance was really attached by the appellant, both to the scars that *were* on the under-surface of his own wrist, and to scars on the upper surface or back of the wrist, which *should have been* apparent had he really been the man sought for.

At one point in the cross-examination of the arresting officer, William Brown, counsel for the defense asked witness what Dale said about examining the defendant's wrist, to which Brown replied, "Mr. Dale never examined his wrist." Kier asked, "Well who did?" Brown answered, "Mr. Harold, the chauffeur. He was the second man that identified him." Kier went on, "Well, what

did he say about his wrist?" Brown was beginning his answer, when the Court intervened with, "Now, this is not proper cross-examination," and stopped the line of questioning.

Every lawyer or person familiar with the rules of testimony will see at once that the Court meant that if there were any desire to elicit Harold's reason for examining the defendant's wrists, Harold was the proper person to give the evidence. But, "why was not Harold called?" is the question that was asked by Harold himself, as we have seen, and surely should be asked by every reasonable man. The District Attorney's Office knew that *Harold* had seized the fugitive who ran from Dale's house; that *Harold* had wrested the revolver from him and that *Harold* had scratched the wrist of the man who was in Dale's house. *Why was he not called in evidence?* On re-cross-examination of the defendant, McCormick asked him, "Now, the reason the chauffeur wanted to look at your wrist was that at the time he stopped you your wrist was cut by his nail, wasn't it?" This shows that the District Attorney knew that what was being looked for by the chauffeur were nail marks on the *back of* defendant's wrist. The defendant's answer was, "No. He wanted to look at my wrist and examined my wrist, and then he shook his head." Now, if Schwitofsky had been really guilty he could not have failed to know that his wrist had been scratched. If he were the man whom Harold stopped and if the scars had been wholly obliterated by healing (an event medically impossible) he would at least have made capital out of the fact and would have dwelt on the examination by Harold of *the back of his wrist.*

But if (as is the contention) Schwitofsky was innocent then the only answer he could give was that quoted above. Nothing had been brought out in evidence about Harold's reason for examining his wrist and the fact

that Harold had scratched his wrist did not transpire to the knowledge of Schwitofsky's friends until months later.

Later on the foreman of the jury asked permission to see defendant's wrist and then the rest of the jury examined it. They saw that there were well-defined scars *of old cuts* on the *inner surface* of the wrist. No one had informed them that there should also at least be the scars of *new finger-nail* scratches on the *outer surface* or *back* of the wrist. When the prisoner finally grasped the significance possibly attached by the jury to the scars and wished to explain how he came by those scars, the Court refused to hear him, as it was then too late. Who shall doubt (nay, the writer has had practically an admission from one of the jurors to that effect) that the jury were convinced that Harold *identified him by the old scars* of the attempted suicidal deed of 1908, and that his reason for examining the wrists was to see whether the arrested man had these old scars.

As we know, Harold examined the man's wrist to look for the scars of his own finger nails on the back of his hand; that the old scars which are on Schwitofsky's wrist were not what he looked for, but—and this is a very important point—the Jury believed that they were the marks by which Harold identified him. As Harold was not there to disabuse their minds, as the prisoner was not permitted, when he realized the importance of the point, to explain in self-defense and as his counsel were too negligent, or ignorant of the facts, to explain the matter, the identification by the witnesses for the prosecution was strengthened in the minds of the jury by the feeling that the scars on Schwitofsky's wrist were the scars for which Harold looked. Thus Judge O'Sullivan's statement that certain scars on his wrist were relied upon to a material extent to prove the identity of the offender was not the fact. What appellant was trying to prove

with respect to the scars was that *the absence of fingernail scratches on his hand absolutely proved that he could not be the offender.*

THE JURY'S FINDING.

The Jury found Schwitofsky guilty as indicted, of burglary in the second degree and felonious assault in the first degree. Section 403 of the Penal Law of New York State thus defines "burglary in the second degree":

"A person who, with intent to commit some crime therein, breaks and enters the dwelling house of another, in which there is a human being, under circumstances not amounting to burglary in the first degree, is guilty of burglary in the second degree."

The essential quality of the act of burglary in the second degree is, we see, the *intent to commit a crime.* In this case the indictment charges Schwitofsky with the intention of "burglariously and feloniously stealing the goods, chattels and personal property of the said Theodore B. Dale." Throughout the trial the prosecution made not the slightest attempt to prove *intent.* It was not alleged that the defendant was in any position, or made any attempt, to steal, or that there was anything stolen. The jury apparently was allowed to infer from the fact that the man was in the house, and from the fact that when the occupants tried to detain him he flourished a revolver, that there was *intent to commit a crime.* But since the crime which the prosecution alleges he intended to commit was that of *theft* and not of *assault,* there is surely at this point a strong reason for describing the prosecution as having absolutely failed to prove burglary in the second degree. The man who went into Dale's house that morning went in, not to steal, but to collect a debt. Whether the demand for the $100 alleged to be due to Gelsky was blackmail or simply debt-collec-

ting would depend upon the view taken by the jury of the value of Gelsky's evidence had he been placed in the witness chair. That the District Attorney was aware of the connection between the two cases it would be an insult to his intelligence to doubt; that the judge was, or should have been, aware of it, is proven by the fact of his receiving a warning letter from the Jewish Chaplain which letter was not retained by him as a private communication but was, at his direction, attached to the papers in the case. The writer is no lawyer, but the essential element of intent was in his opinion neither entered upon, nor proven. What does the average reader think? But if the jury were, from a legal point of view, justified in considering that the fact of entering implied the intent (and there are cases which might be quoted to show that the law does not permit this) what will be said with respect to the second count in the indictment of which the accused was found guilty?

Assault in the first degree is thus defined in Section 240 of the Penal Law:

"A person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another,

1. Assaults another with a *loaded fire arm* or any other *deadly weapon,* or by any other means or force *likely to produce death;* or

2. Administers to, or causes to be administered to or taken by another, poison or any other destructive or noxious thing so as to endanger the life of such other,

Is guilty of assault in the first degree."

This definition is perfectly clear. An attempt was made to show that the revolver which the pretended telephone repair-man flourished was loaded, and in the following manner. While Dale, the complaining witness, was giving the evidence, during the course of the direct

examination, the Court asked, "Did you see the revolver?" To which the witness answered, "Yes sir." The next question was, "How near were you to him at the time?" and the answer was, "The width of the door, about three feet." To the question, "Do you know whether or not it was loaded at the time?" witness answered, *"I saw cartridges in it,"* and to the next question, *"When,"* the answer was, *"At the time he pointed it at me."* The fact that Dale swore that there were *cartridges* in the revolver when it was pointed at him was the *sole evidence* which the prosecution relied upon to prove the necessary element for felonious assault in the first degree, that is, that it was "a loaded fire arm." It did not occur to the Court to ascertain whether the cartridges had not been *fired off,* or whether they were not *blank* cartridges.

Now, there is entirely convincing and irrefragable proof, as shown in the affidavits of the chauffeur, Harold, and the detective, Cousin, that the revolver that was on that day wrested from the fugitive had *two blank* cartridges, while the rest of the chambers were *empty.* Will it be maintained that a weapon so void of offensive power can be described as 'a loaded firearm or other deadly weapon?' It is the usual practice in the courts, whenever a weapon has been flourished or used in a case of assault, to produce that weapon and make it one of the 'People's Exhibits.' As far as can be ascertained, the revolver taken from the fugitive on January 19, 1911, has never left the custody of the property clerk at police headquarters from that day to this. If there be grounds for difference of opinion on the question of whether the jury was, or was not, justified in finding the accused guilty of burglary in the second degree, there are no conceivable grounds which would justify the jury in denying the contention that since the pistol was *un*loaded and was not a lethal weapon, therefore the *intent* to *kill* a human being

(which is the first *essential* to assault in the first degree) or the *intent* to *commit* a *felony* upon the person or property of the one assaulted, was ENTIRELY ABSENT. No one holding an empty revolver across a room at a person can be accused, certainly cannot be convicted, of an attempt to kill that person, and since, according to all the evidence, the object of flourishing the empty revolver was to enable the offender to secure *egress,* there was no attempt to commit a felony upon person or property.

DALE IN A THIRD CASE.

On the 16th of December, 1912, Theodore B. Dale met Jack Young, a young fellow aged seventeen, who describes himself as an actor, in a subway car near the 110th Street Station. Dale accosted him, and eliciting that Young was out of employment, invited him to accompany him to his home, promising to secure employment for him. Young accepted the invitation, and when they reached Dale's home in West 116th Street Dale attempted to commit an act on him of a similar nature to that described by Gelsky as having taken place in January, 1911. Young resisted stoutly, and there ensued a struggle in which a *colored housekeeper* of Dale's took part. The noise attracted the attention of Officer William J. Koop who, hearing Young's story, arrested Dale. On the 17th Magistrate Murphy held Dale in $500 bail on a charge of "soliciting." The charge was apparently a compromise between the magistrate's desire to have Dale held for trial by Special Sessions and the fact that, under the circumstances, it was difficult to find a section of the Penal Code under which Dale could be charged with anything more than 'disorderly conduct,' or some such comparatively trivial offense. On January 24th Dale, who was out on bail, was presented at Special Sessions and pleaded not guilty, and the case was remanded for one week. On the 31st of Jan-

uary, when the case was called, Dale did not put in an appearance. Affidavits were submitted showing that he had absconded from this city. His bail was forfeited.

After a few weeks' absence Dale returned to the city. It is alleged that he first came back to Chicago, there told his story to a firm of lawyers, and was by them counselled to return and plead. He surrendered himself before the Court of Special Sessions on February 28, 1913, pleaded guilty to the charge, and was remanded for a week. It was during the currency of this week that he came under the notice of the Jewish chaplain of the Tombs, and was recognized as the complaining witness in the Schwitofsky case. On March 11th new counsel appeared for him, and an affidavit was submitted that Dale's previous plea of guilty had been entered while Dale was in an extremely nervous and excited condition, and, other reasons being shown for that course, his plea of guilty was, by permission of Court, withdrawn. He pleaded not guilty, and was held in $1,000 bail for trial, the date being fixed, according to the usual practice of Special Sessions, for that day week. On the 18th of March when his case was called, he was again absent. His bond was again forfeited, and next day he was found dead in his home at 126th Street, having committed suicide by inhaling gas.

During this period in March a great deal of information about Dale, of a very striking and important nature, reached the ears of the writer. The information, coming from official sources but being given unofficially, could not be made the subject of affidavits. One unfortunate result of Dale's suicide is that the report of the Probation Officer of Special Sessions Court,—the result of his investigations in the beginning of March before the withdrawal of Dale's plea of guilty—was not presented to the Court and therefore not available to the general public. But there is very sufficient reason for believing that when the time comes, and when, with proper authority, this report is

published, it will cast strong light upon the character of Dale, and especially on his attitude in the Schwitofsky case. It may be asked: Why did Dale abscond in January, 1913? Why did he return in February? Why did he first plead guilty, and then withdraw his plea? And finally, why did he commit suicide? The answers to all these questions will be very instructive, but can only be put, at this stage, in a conjectural form. Dale fled in the first instance because his past, he knew, would not bear investigation, and because he had been caught this time under such conditions that there seemed to be very little chance of his escaping punishment, or at least, exposure. It is said that he had important business interests in New York, which accounts for his return. It is rumored that he spent money lavishly for legal advice, and it is alleged that thousands of dollars went into the hands of various firms of lawyers before he surrendered himself in February. When he did so he pleaded guilty, probably not knowing of the Court's practice of investigation when such pleas are entered. An authoritative statement has been made that when the investigating officer interrogated him about his past, he tendered the sum of $1,000 in notes through the bars of his cell, to secure the promise of a favorable report and the suppression of unfavorable facts. The bribe being refused, and learning from the lawyers that the charge of 'soliciting' could not legally be maintained against him, he, on the advice of counsel, withdrew his plea and substituted one of not guilty. During the week which intervened between the new plea and the trial, he is described as having been in a state of excitement and hysteria almost amounting to mania. He alternated between expressions of abject dread as to the results of cross-examination if he stood trial, and of defiance of those whom he considered his enemies (chief among them being, in his opinion, the writer) and demanding that he be confronted with his

persecutors. The end came by suicide, really through dread of exposure of his perjury in the Schwitofsky case, if certain statements quoted as having been made by him are reliable—and they come from a source which seems beyond suspicion.

It will be seen that while Dale might be very close and keen in business matters, for he seems to have borne the reputation of being a sharp business man, wherever his weakness of moral character and infamous practices were touched he was quite prepared to spend money lavishly. It must be asked if this characteristic did not probably display itself throughout his career, and whether it may not have some bearing upon the extraordinary and suspicious points surrounding the arrest and trial of Schwitofsky?

THE DISTRICT ATTORNEY INTERVIEWED.

When the writer first discovered Dale in the cell in the Tombs early in March, 1913, the appeal in Schwitofsky's case to the Appellate Division was on the point of being made. The fact of Dale's having been arrested and having confessed his guilt in the charge made by Young had a very important bearing on the Schwitofsky case, as tending to show the extreme probability of the truth of Gelsky's charge two years before. The information was at once placed before Messrs Untermyer and Gallatin, the eminent counsel who were acting for Schwitofsky. Those gentlemen said that the lapse of time made it impossible to bring this important fact within the purview of the Appellate Court. In vain the writer repeated the plea of poor Bassanio:

"..... I beseech you,
Wrest once the law to your authority:
To do a great right do a little wrong."

The honorable counsel replied, as did Portia,

"It may not be,

There is no power in Venice,"

or words to the same effect.

Accompanied by Mr. Frank Marshall White, the journalist whose work in the Schwitofsky case was of such supreme importance, and Mr. Eddy of the *New York World,* the writer called upon the Honorable Charles F. Whitman, the District Attorney of New York County, at his office, informed him of the latest developments in the case, and begged him to take advantage of the presence of Dale in the Tombs to re-investigate the case of Schwitofsky. Mr. Whitman was very courteous in manner and expressed his desire to all in his power but when entreated to take charge of the case himself he expressed his regret that he was too much occupied. He tendered the services of his chief assistant, who whenever he is absent is Acting District Attorney, Mr. Wasservogel.

Mr. Wasservogel was visited the next day, and when the writer said, "I must ask you now to let me tell you briefly the salient facts in the case of Alfred Schwitofsky," he was interrupted by Mr. Wasservogel with the statement, "Oh, I know all about that case; indeed, there is not a man in the District Attorney's office who doesn't know the whole case." Unless Mr. Wasservogel considered Mr. Whitman more, or less, than a man, it seems permissible to conclude from this statement that Mr. Whitman personally knew all about the Schwitofsky Case. Thus the blame for the extraordinary miscarriage of justice in the case of Schwitofsky must rest on Mr. Whitman's shoulders. McCormick's responsibility must now be passed on to him.

WHAT REMAINS TO BE DONE.

When discussing this case with various citizens of greater or lesser eminence, for the writer has striven to secure support in every possible direction, more than once the suggestion has been made that the facts be placed before the Governor and an appeal be made for Executive Clemency, to which the writer has always replied: "If the man is guilty, as charged, and if the conviction was just, then there is no reason why the Governor should intervene. If the conviction was mistaken and the man is innocent, then a pardon does not meet the necessities of the case." Said one eminent lawyer, "Are you not, in the final analysis, really playing with the poor fellow's liberty?" To which the writer, a clergyman, made the reply, "Now, God do so unto me and more also, if I rest, or cease agitating, while there is a chance of getting justice, and not mercy, for the poor wretch."

Obviously, the easiest way out of the difficulty would be to ask for a pardon, and very possibly there would not be much trouble in securing one. But Schwitofsky's fate has now become of minor importance in the problem involved. If Schwitofsky be innocent we have the case of an unfortunate sentenced by a Court of this County to twenty years imprisonment, under conditions which are an arraignment of our whole legal system. The following questions, always assuming the absolute innocence of Schwitofsky, must be asked:

Why was this man arrested?

What led to his selection as the culprit?

Why did the Police suppress the fact that an unloaded pistol might be made an exhibit in the case?

Why were the charges against this innocent man made to grow in gravity as time passed?

Why was the case tried in so slovenly a manner?

Why was it defended in so unsatisfactory a manner?

Why did not the District Attorney's Office produce the pistol in the Court?

Why was not Harold called to testify as to what it was he was looking for when he examined the wrists of Schwitofsky?

Why was not Cousin called to testify to the condition of the supposed lethal weapon when it was passed to his care?

There are a half score similar questions which will suggest themselves to the intelligent reader, all of which must be satisfactorily answered before the people of the City of New York can be assured that a recurrence of conviction of innocent people has, so far as is humanly possible, been provided against in our Courts.

No, it is quite clear that we should not be doing our duty if we contented ourselves with a pardon. There must be some legal method of re-trying the whole case, which will permit these points to be thoroughly investigated. There still remains recourse to the Court of Appeals in Albany, but it would seem that such action would not permit investigation of all the dubious, suspicious and alarming features of the case. The Court of Appeals would probably reverse the decision so far as the conviction on the second count is concerned—it is absolutely inconceivable that there should be any difficulty on that point. But lawyers are of the opinion that, under the present circumstances, nothing would be done by the Court of Appeals to touch the conviction on the first count in the indictment.

THE CASE OF BRAND.

The famous case of Foulke Brand has, singularly enough, a remarkable bearing on the present one. The

facts in the Schwitofsky case have been submitted to every prominent newspaper and magazine published in this city, and the contribution has been uniformly declined, sometimes without any reason being given; sometimes the reason being stated. Prominent conductors of newspapers have told the present writer that they could not touch the case in view of the blunder that had been made in the Brand Case. Now the investigation in the Schwitofsky matter was being carried on long before the re-opening of the Brand case was mooted. The publicity and excitement connected with the Brand case made it inexpedient, in the opinion of Schwitofsky's supporters, to move in his case until that excitement had died away. The District Attorney who played so prominent and so disastrous a part in the Brand case, may possibly have considered himself excused from taking a prominent part in the Schwitofsky case, on the principle involved in the old adage that "the burnt child dreads the fire." Thus the sin of *omission,* in the failure to put the whole evidence before the jury in the Schwitofsky case was committed by the District Attorney, and the sin of *commission* in the mortifying blunder committed in the Brand case was committed by the same person.

But the Brand case has given us a clue to the means by which the desired investigation can be made. *What Schwitofsky's supporters now hope for is that the Governor of this State may be induced to appoint a Legal Commission, with full power to re-investigate and examine everybody involved in the Schwitofsky case, similar to that which Governor Dix appointed in the Brand case.* No other means will be effective to give the New York public a sense of security and a well-founded faith that there is extreme unlikelihood of any innocent man being again sentenced to twenty years imprisonment through blundering, malice, or perjury—all three factors having unquestionably been in operation in Schwitofsky's case.

A JUDICIAL COMMISSION—that is what is asked for, and assuredly is what should be granted in the interests of Justice; and for the punishment of the evil-doers (if there be any) in this case; and as a safeguard to the public against any repetition of this deplorable legal blunder.

WEAKNESSES OF OUR SYSTEM.

I. "ASSIGNED" COUNSEL.

That the Schwitofsky Case, moreover, displays dangerous weakness in our methods of dealing with accused persons cannot be denied. The particular weaknesses now to be referred to are such as can only be remedied by legislative action. Why should a poverty-stricken wretch not be in a position to have a just and equitable trial and a proper defense? Mr. Samuel Untermyer, who did such fine work in trying to secure justice for Schwitofsky before the courts, had three years before he heard of the Schwitofsky case directed public attention to a great evil in our administration of criminal law. In an address before the American Academy of Political and Social Science at Philadelphia, on April 9, 1910, Mr. Untermyer had this to say:

"This brings me to the next suggestion I have to offer which is that there should be an office established as part of the machinery of the criminal law to be known as that of the Public Defender.

"Unjust convictions among the poor and helpless and especially among our ignorant foreign population are far more frequent than we fortunates care to admit. This is especially true in the great cities where the courts are crowded with business, the pressure is great and justice is necessarily hurriedly administered in obscure cases.

"*The most prolific abuses occur in what are known as 'assigned' causes in which the defendants and their families and friends are too poor to furnish bail or employ counsel. In those cases the Court assigns counsel who serve without pay except that in some states a moderate fee is allowed in capital cases only. The counsel assigned in these cases are with rare exceptions almost necessarily young and inexperienced men or lawyers without standing or ability.*

"Yet these are the cases above all others in which the defendants are already at the greatest disadvantage being incarcerated, unable to go about to look up witnesses and too poor to employ anyone to do so for them. If they are first offenders of previous good reputation, as they generally are (for experience has shown that professional criminals are generally able to secure counsel), their prison experience has taken the courage out of them by the time they are placed on trial.

"They come to the bar of justice crushed in spirit, and if innocent, in mortal terror of the law and resigned to any fate. Their assigned counsel whose retained clients are his chief concern easily convinces himself that he has done his duty to his pauper client if the prosecutor will accept a plea of guilty to a lesser form of crime or be content to recommend a moderate sentence. And so before the poor fellow knows what has happened to him he has consented on less notice and in less time than it requires to tell the story, to take the advice hurriedly given him as he stands quivering at the bar and so he finds himself on the way to prison. There is hardly a day in the year when this scene is not enacted in the Courts of our great cities. *That such a system results in innocent men being branded and punished as criminals admits of no doubt.* That the number of such crimes against justice and humanity is very much underestimated is beyond question to anyone who has observed the system in operation. The judges do what they can to minimize the evil but from the nature of the case they must rely on counsel.

"What then is the remedy?

"The State has its Public Prosecutor. Why not its Public Defender to care for those who are unable to defend themselves? It is quite as much to the interest of the State to rescue the innocent as to punish the guilty. There is no danger of the privilege being abused. Every man who can afford to defend himself will exhaust every resource to select a champion of his own choice. The most helpless and unfortunate of all our citizens should not to be forced to go virtually undefended.

"Nowhere in our social fabric is the discrimination between the rich and poor so emphasized to the average citizen as at the bar of justice. Nowhere should it be less. In an ideal state of government the lines would be made to disappear here of all places. Money secures the ablest and most adroit Counsel whose characters and reputations are powerful factors in their client's cause. Evidence can be gathered from every source and all the legitimate expedients of the law availed of. *The poor must be content to forego all these advantages but surely the State should not take an unfair advantage of his helplessness.*"

It would be idle for me to add one word to the forcible and just statement of this eminent man, except to say that where Mr. Untermyer speaks of innocent men being

branded and punished as criminals, he is stating not merely a presumption, but a *fact*. The present writer can recall a number of such cases as having come under his notice. Out of this number, some stand out in his memory very clearly. In one case the victim had actually been sentenced to five years in Sing Sing, when the present writer intervened and made strong representations to the Judge, who being a humane, good-hearted and reasonable *man* besides being a judge, consented to grant the necessary 'stay of commitment' to jail after the sentence, and thus enabled the writer to produce—as the result of a cable inquiry made in Europe—satisfactory evidence of a miscarriage of justice. Acting *on his own initiative,* as soon as this evidence was placed before him, the judge spoken of directed a new trial on the ground of newly discovered evidence, and within half an hour of the opening of court the fortunate victim of the error was free.

In another case a man, a foreigner with but slight knowledge of English, who had committed no crime known to our Code, had been recorded as having pleaded guilty to a felony, and stood in danger of a sentence of two years' imprisonment in the State prison. The writer represented to the Judge in this case that the accused declared he had not intended to plead guilty and had not pleaded guilty, that the record of a plea of guilty was an error caused either by his misunderstanding what was asked him, or by the court officers having misunderstood what he had replied. Moreover, a hurried investigation had shown that no crime had been committed. In this case the Judge, one of the most humane and upright men on the bench, at once ordered that the plea of guilty be withdrawn, and that the man be placed for trial within a few days. The trial took about an hour and a half; the jury retired for ten minutes and brought in a verdict of acquittal. These two, among a number of cases of which the writer has knowledge, are quoted for the reason that

rectification of the first error occurred under the regime of District Attorney Jerome, and had no unpleasant result on the relations between the writer and the District Attorney's Office at that time. The course taken in the second case, occurring under Mr. Whitman's reign, encountered violent opposition from the District Attorney's Office, and formal charge is said to have been made by Whitman himself that the writer had been bribed to intervene and had interfered unjustifiably with the due course of justice!

Whether the remedy suggested by Mr. Untermyer is practicable is a question that is debatable. The writer has always favored the course of engaging well-qualified counsel by an annual retaining fee paid by the various organizations, Jewish, Protestant, Catholic and Colored, which maintain agents to work among prisoners of their special religions or races. The obvious objection to the proposal of a State Defender that a great deal of waste of the State's or City's time and money might be brought about by applications from defendants who are unquestionably guilty could be overcome in the alternative proposal by the fact that counsel engaged by private benevolence would only intervene in cases where previous investigation by benevolent workers had shown that there were grounds which justified that intervention. But whatever may be the differences of opinion on this point, no worker in the prisons or courts can have failed to be haunted by a sense of injustice unwittingly done in numbers of cases—and not merely in cases where there is absence of guilt, but in cases where the degree of guilt does not justify the severity of the sentence imposed.

WEAKNESSES OF OUR SYSTEM.

II. "SECOND OFFENSES."

Another instance where legislative enactment is necessary to correct a grievous wrong done with the approval of the Statute Book is in our present positively infamous practice in cases of "second offense." Section 1940 of our Penal Law provides that a person who has been previously convicted within this State of a misdemeanor, and who is afterwards convicted of a felony, must be sentenced to imprisonment for the longest term prescribed upon conviction for the felony. The following section provides that a person, who after having been convicted within this State of a felony, commits any crime within this State, is punishable upon conviction of the second offense, by a term not less than the longest term, nor more than twice the longest term prescribed upon a first conviction.

This is not the place to enter into an exposition of the absolutely preposterous and brutal nature of these provisions. Fortunately, the very unreasonableness of their severity acts as a deterrent against their application, for if they were applied uniformly and impartially our prisons would be filled with men committed for not less than ten years and often for the period of their whole lives. Aside from the question of the capricious nature of the application of these Sections, there is the grave objection that the practice has arisen, when a person is indicted for the commission of a second offense, of reciting in the indictment all particulars of previous offenses and, at the trial, before the prosecution closes its case, of adducing evidence to the effect that the person has previously been convicted. This, in spite of all the warnings of counsel for the defense, or of the Court, inevitably sets up a presumption of guilt in the minds of

the jury, which must have a most deplorable effect on their verdict. Who, possessing any knowledge of human nature, will, on reading the 'People's Story' in the Schwitofsky Case, fail to perceive that before the jury had heard the defense a presumption of the guilt of Schwitofsky had already been set up, which presumption had a most prejudicial result on the jury's mental attitude towards his loud protestations of his innocence? Where the man was in reality most truthful and should have been most convincing, he was regarded, in all probability, as being most crafty and most unreliable.

During the last session of our State Legislature a bill partially, but only partially, remedying this was introduced and was passed by the Assembly, but it was among the many "slaughtered innocents" foully done to death by the Senate during the last days of its session, when the important question of the whitewashing of former Senator Stillwell was occupying the attention of that august body to the exclusion of all other subjects of deliberation.

That the average citizen is indisposed to grant justice to a man who has previously been proven to have done wrong is a matter of common experience. Time after time when the writer has stated the facts in Schwitofsky's case to decent citizens of fully average intelligence and humanity, he has met with the reply, "Oh well, the fellow's an old convict; I suppose no great harm has been done!" This feeling is wide-spread, and perhaps is the natural first impulse in the mind of an honest man. But let it be stated here that the very foundation of our social system, and our freedom as self-governing persons are more seriously jeopardized by this attitude on the part of the general public than ever they were by the action of foreign tyrants. The late Mayor Gaynor on one occasion made one of his shrewd and illuminating hits by pointing out this danger.

We have, let us say, some two hundred plain-clothes men in our police department, to whom is entrusted the important duty of hunting down and arresting offenders against person and property who have escaped the hands or notice of the uniformed police force. Recent revelations must have convinced us that in New York, as in London, Paris, Berlin and elsewhere, there is an ever-present danger of a combination for evil between detectives and criminals—between the wolves and the watch-dogs.

There are perhaps twenty-thousand discharged or paroled convicts at this moment in New York. If it be made an easy matter for a rogue in uniform to convict a previous offender of the commission of further crimes (of which he is in reality innocent) because public sentiment and legislative enactment do not demand the convincing evidence, nor insist upon the just safeguards that are required in the case of a first offender then the result will be threateningly dangerous to the community.

A few plain-clothes men could hold in terror an army of twenty thousand slaves and force obedience to their every behest under pain of imprisonment, on an easily trumped-up charge, for twenty years or for life. Poverty-stricken and friendless, with no defense worthy of the name, no consideration on the part of district attorney, judge or jury, the hapless wretch would have as much chance of escaping the toils as had Schwitofsky.

There has recently occurred a well-known case in which it was shown to the satisfaction of a jury, that a highly-placed police officer simply directed that certain former convicts remove an obnoxious person from his path. He had it in his power, if these, or any others designated, refused to obey, to punish them with a severity which not even the old *Lettres de Cachet* of the times preceding the French Revolution could surpass.

Very little reflection is needed to convince the thought-

ful citizen that not only it is proper that the man who has committed a crime and has been punished for it should receive every protection and encouragement to avoid doing ill and continue doing well, on the grounds of religion and humanity, but that any opposite attitude on the part of the general public menaces the very existence of our social organization.

Instances of mistaken identity leading to condemnation to death are not unknown. The well-known case of Adolph Beck, of London, where the man was with difficulty saved from the gallows and where it was shown that the identification was utterly mistaken, must still be within the reader's recollection. Last year Sir Arthur Conan Doyle, the famous writer, published "The Case of Oscar Slater" who in May, 1909, was sentenced to death in the High Court at Edinburgh, and who, as Doyle shows, is the victim in a case of mistaken identity. He is still in jail in Scotland, four years having elapsed since the Secretary of State for Scotland commuted the capital sentence to that of imprisonment for life.

In the course of his statement in defense of Oscar Slater Sir Arthur Conan Doyle tells us that Slater was a gambler, a "follower of the races" by profession; and that he had been living in Glasgow with a woman who was not his wife. For these two reasons Doyle very justly contends that "Oscar Slater was a blackguard"—a characterization severe, but not to be refuted. Then Sir Arthur makes the following curious observation:

"One cannot feel the same burning sense of injustice over the matter. And yet I trust for the sake of our character, not only for justice, but for intelligence, that the judgment may in some way be reconsidered, *and the man's present punishment allowed to atone for those irregularities of life which helped to make his conviction possible.*"

The writer is a great admirer of Conan Doyle and re-

gards him as one of the leading English litterateurs of our day, but with all due respect to that eminent gentleman, it may be fairly said that no more mischievous doctrine was ever uttered. Slater is innocent of the crime of which he was convicted, was put in jeopardy of his life, and has been suffering for four years imprisonment for a crime which he did not commit. His life previously was irregular, but the fact that he was a book-maker and gambler does not constitute him a criminal under the English law, nor does the fact that he was living in meretricious relations with a woman not his wife constitute a felony under the English law. If these two irregularities were proven against him in an English court of law, no imprisonment could be inflicted by way of punishment. Sir Arthur, not apparently realizing the prevalence and unwisdom of the dangerous and threatening public sentiment that a man whose character is not good may be punished for a crime of which he is innocent and may not be entitled to pity, makes the plea, that his five years' imprisonment may be regarded as atonement. Atonement? For what? For the blunder of the Scotch court of law? If the man be innocent, as Sir Arthur maintains he is, and as seems probable, the irregularities of his former life have no right to be considered. The injustice done to him is just as great as if he previously led a regular life, the danger to the community is much greater, and the punishment to the victim much more severe.

A man of previously decent life condemned through a judicial error to imprisonment is buoyed up by the knowledge of his own worth and by the certitude of public sympathy in amplest measure when his innocence is established. But one whose life has not been spotless is robbed by such an attitude as Sir A. Conan Doyle assumes of even that remote consolation.

It behooves society to be just as careful of the liberty and rights of an old offender as of those of one never

previously accused. That is the Moral Law. It behooves Society, in self-protection, to see that the injustice of the unjust and the iniquity of the evil-doer be not emulated by the defenders of society. That is very good Social Law.

The sooner our present *infamous* method of dealing with second offenders be abolished, the better for justice and righteousness, for the reformation of the wrong-doer and for the protection of our whole fabric of civilisation.

WEAKNESSES OF OUR SYSTEM.

III. APPEAL TIME LIMIT.

Where is the justice or common-sense in denying a man the opportunity of proving his innocence in a higher court, and of appealing from the errors or lapses of the trial court in cases where lack of means, neglect of counsel, or absence of witnesses prevent him from being ready to present his case within twelve months from the date of sentence? Where is the equity or common human justice in refusing to consider newly discovered evidence if accident dictates that that evidence can only be procurable in the thirteenth month after the date of the sentence?

Even the most heedless observer will at once realise that there exists a necessity for placing some term to the period in which a case already adjudged may again trouble the courts. That important element being fully recognized, it is arguable that twelve months is altogether too short a period, and that the time limit in certain classes of cases should remain unfixed. The right to appeal in cases where the appeal depends on argument of faulty legal methods or on considerations of differing opinion as to the intent and force of an enactment may

justly be limited to twelve months. But so comparatively brief a term in cases where new and striking facts which either by the neglect of counsel or through the want of knowledge and necessary opportunity for securing evidence for the defense were not produced at the trial, is a grievous injustice to the accused, especially where the failure to produce the favorable evidence is due to poverty.

The hardship inflicted by the rigid time limit is specially oppressive in cases where *perjury* may be proven—as was the case with Schwitofsky. The later facts with respect to Dale's career only transpired about eighteen months after the trial. Had it been possible to place before the Trial Judge or the Appellate Division the facts with respect to the charge of Jack Young against Dale, the forfeiture of bail, the varying pleas and the suicide of Dale, would it not have placed the appeal of Schwitofsky on a different and stronger footing? It may be suggested that the time-limit for appeal, which is expedient and useful in certain classes of cases, should not be applicable in that minority of cases in which the grounds urged do not depend on legal points, but that the Courts should be in a position to take cognizance of *newly discovered evidence* without respect to *any* time limit.

It has been pointed out to the writer that the pardoning power is vested in the Governor's hands, for the very purpose of meeting such cases. But where a man's innocence can be shown, a pardon does not meet the requirements of the case. A pardon does not rehabilitate a man and it is a matter of current comment that it is ludicrous to pardon a man for a crime that he never committed. It is quite conceivable, also, that there may arise cases in which the new facts, which conclusively prove the innocence of the accused, only see the light *after the sentence has been wholly served.* Should not a citizen

so wronged have the right to such reparation as is humanly possible at the hands of those who, with the best intentions, of course, did him the wrong? In other words, in such instances, only the Courts can set right the wrong which the Courts committed.

The Chaplain's Story.

He certainly was not an attractive-looking person as I peered into his cell in the Annex of the Tombs Prison (where people charged with misdemeanors are placed) on that afternoon, in February, 1911. At first view I did not take him for a Hebrew, but judged him to be a Slav, and was passing on, when he accosted me. He asked if I were the new Rabbi at the Tombs and expressed his profound regret that my predecessor, who was a friend of his and had formerly taken a great interest in him, was now deceased. He said that his name was Alfred Schwitofsky, and that he was entirely innocent of any crime. The charge against him was "Unlawful Entry," and all he knew was that he had been taken out of bed at midnight a few days before by a plain-clothes officer who told him that he was accused of having unlawfully entered some building. He had told the officer that he was unconscious of any wrong-doing and that he was perfectly willing to go with him at once and have the matter over, because he was working and had to be on his job early the next morning. He was taken to a place in 45th Street by two plain-clothes officers, one of whom remained on the floor below with him while the second went upstairs. The second man, returning, took him upstairs with him, leaving the other officer below. He was shown into a room where sat a man whom he had never seen before, and who, turning up the gas jet looked at him and said, "No, I don't think he is the man." The officer with him nodded meaningly to the stranger, and the latter then said, "Well, let me see his hands." The stranger examined his wrists and

said, "Well, perhaps he is the man. I guess you had better hold him." That was all he, Schwitofsky, know of the matter. He had no friends and no means to employ counsel.

Asked why he thought he had been arrested, he replied that he had been in the Penitentiary, and that since his release he had been working steadily. He had recently met a former inmate of the Penitentiary who had been in the same workroom with him, and this man had asked him what he was now doing. He had replied that he was earning money in an honest way, and his former prison-friend had pooh-poohed his honesty and pointed out how easy it was to make as much in a night as he was earning in a month. This man had spoken to him several times and tried to induce him to go on a 'job' with him. He, Schwitofsky, had complained about it to the plain-clothes men, and they had suggested to him that he make a special appointment with his prison acquaintance and let them overhear the conversation. He had made appointments, twice, but the other man was apparently suspicious and had failed to keep either appointment. He now suspected that his prison-acquaintance was a 'stool-pigeon' and that the police, having failed to entrap him, were determined to arrest him on a charge anyhow.

Schwitofsky's story was one of a type that I frequently listen to, and I paid very little attention to him or his narrative.

When, however, I had completed my round for the afternoon, I met Mr. John Hanley, the deputy warden of the Tombs—than whom I know no more efficient, kindly or conscientious employé of the Department of Correction. Hanley said to me, "Doctor, did you see *Gerber?*" I replied, "No, I haven't seen any man of that name." He said, "He's in the Annex," and described his personal appearance. I said, "I spoke with a man of that description who said his name was *Schwitofsky.*"

"Well,' said Hanley, 'I believe he is known by that name too." Hanley continued, "Now, Doctor, I never knew a man in my life who tried so hard 'to make good' as this one did. He attempted suicide in his cell about two or three years ago, and was so nearly succeeding that it was only by a miracle that his life was saved. He was sent to Matteawan, and on being discharged from there, was released on a suspended sentence. He used to come to see me very frequently, just because he was grateful and friendly to me. He would even come to me to show me a new suit of clothes that he had purchased, and to tell me with a look of joy on his face, that he was engaged to be married. I should be very glad if you could do anything to help him."

Now, I have the greatest regard for the opinion of Mr. Hanley, and as a result of his statement I went into the office of the chief clerk of Special Sessions, and there, in the presence of one of the judges, whose name I now forget, repeated the story Schwitofsky told me. I apologized for speaking about it before one of the judges who might sit in trial on the man, but his Honor laughingly said, "Well, consider me deaf or absent. Go ahead." When I had briefly outlined the man's story I made the request that good counsel should be assigned to him. A memorandum was made of the name, and a promise was made to me that his case would certainly receive careful attention.

Next day I went into the Court to ascertain what had happened in the case, and was informed that, at the request of the District Attorney's Office, Schwitofsky was transferred to the Court of General Sessions. The next time I saw Schwitofsky he was in the main building of the Tombs, and he said that he was now charged with burglary in the second degree, but he still maintained his entire innocence of the transaction which led to the charge.

On the same tier in the Tombs with him was a young fellow named Leo Gelsky. Gelsky had told me a story to which I had not listened with any great interest, as it involved degenerate sexual practices. Later on I received the following letter and confession from Gelsky, which was practically the story he had told me orally, in greater detail.

"Rev. Dr. Goldstein:—Your sermon of February 11th has made such an impression on me that my conscience will not leave me in peace. There has been a great wrong done an innocent man, and I'm the only person who can explain. I was made a party to a 'Frame-up.' I will tell you. Dr. Goldstein, as my spiritual adviser, the true case.

"The beginning of January, 1911, while I was in a 'penny arcade' on Fourteenth Street, a man accosted me, and after finding out about my circumstances, he gave me carfare and asked me to meet him at S P. M. at the corner of Forty-fifth Street and Sixth Avenue. He told me he could get me a good job. At the appointed time I met this man, and he invited me to his house. (Here follow details of an indescribable assault upon the visitor by the owner of the house.)

"He said he would pay all doctor's expenses and fix me up. He went out and came back with a man whom he addressed as Gates, and who addressed him as Grace. Mr. Grace then asked Mr. Gates to bandage me up, which he did. When Mr. Gates was through Mr. Grace begged me to put my coat on, and after pressing a five dollar bill in my hand told me that if I came to-morrow he would give me $100, which he thought would cover the doctor's expenses. I didn't like the arrangement, and I told Mr. Grace so, and asked him to give it to me now, and he said that he did not have that much money in the place, but he would give me a note to be collected to-morrow. I accepted the note. He also informed a blonde girl whom he called from upstairs and told her to show me out.

"The next morning I called at Mr. Grace's house, and he put me off until the following day. This Mr. Grace, who afterward became known to me as Mr. Dale, kept this up for about two weeks. I finally decided to change my tactics. I went to see a fellow whom I have told of this; wrote a letter and gave it to him with the note which Mr. Dale gave me, and asked him to go to his house and collect the money. I went with him as far as the house and waited outside.

"About five minutes afterward I saw my friend coming out of the house and calling Mr. Dale, who was following him, all kinds of names. Then Mr. Dale started to holler 'Stop thief,' and a great crowd gathered. Mr. Dale also said to the people that my friend had a revolver, but several of the people after searching him said that he did not have any. Mr. Dale accosted me and said: 'How could you expose me that

way in my own neighborhood!' My friend was relating to the crowd the whole story and demanding Mr. Dale's arrest, but Mr. Dale persuaded the crowd to let my friend go. We then took a car and left the neighborhood. On the car he told me that Mr. Dale took both the letter and the note, and refused to pay.

"The following Saturday I met Mr. Dale on Fourteenth Street again and he said that his name must be cleared regardless of cost, as he could not stand the exposure he received in his neighborhood. He also told me that the letter he received he gave to a detective, and he said if I wrote any more he would have me arrested. I wrote another letter, sent it by a boy whom I promised a quarter of a dollar, and was immediately arrested. I was taken to his house and then to Police Headquarters. From there I was taken to Fifty-seventh Street and arraigned before Magistrate O'Connor. Then I was taken to a side room by a detective by the name of Dungate, who told me that they've got a fellow whom they could connect with the crime, and showed me a picture which he told me Mr. Dale identified in the Rogue's Gallery. As I could not identify the picture, he told me to say so anyhow, and if I would state in court something he will tell me he will see that I am discharged; otherwise I would get fifteen years. I was frightened and said 'yes' to everything they asked me. Tuesday when I returned from court, the officer beat me on the way to the lockup, as I said I could not identify anyone else but the right man. Fearing any more beating I did what they asked me to.

"This is the true and exact story how everything happened.

"Rev. Dr. Goldstein, I am keeping to my cell, as I've not the courage to tell this unfortunate how he got into trouble. Kindly submit to him the real story of the case, as I know he does not know anything about it. His name must be Alfred Sickofsky, or something like that."

I looked up the records of both cases in the General Sessions Court office and found that in both the complainant was the same person—Theodore B. Dale of 71 West 45th Street. This fact was in itself enough to attract my attention, and I made further inquiry from both accused, into the facts of the case as they told them. I noted that both of them were on the same tier in the Tombs, in cells not far from each other. This, of course, was a suspicious fact and suggested that there might be collusion between them in their stories. I went to Gelsky's cell and I said, "Do you know the man in Cell No. ——." He said, "No, I don't know him." I said, "Have you never seen him in your life before?" Gelsky

replied, "Not to my knowledge." "Have you ever seen his portrait?", I asked. Gelsky said, " I don't know the man." I went to Schwitofsky and said, "Do you know *Leo Gelsky?*" He replied, "No." I said, "Now, Schwitofsky, you want me to help you, and you have been telling me lies. You are perfectly welcome to do without my help, but if you want my help you cannot expect it if I find you trying to deceive me." He said, "I have not told you lies, Doctor." "Well,' I said, 'if you don't know Gelsky, who is that boy in Cell No. ——?" He said, "That's Hoffman."

I went back to Gelsky's cell and said, "Gelsky, do you know a man named Hoffman?" Gelsky said, "No." I said, "Gelsky, you are asking me to help you, and you are telling me lies. It is no earthly use trying to deceive me, because I shall drop your case at once when I am certain that you are lying to me. Now, *do* you know a man named Hoffman?" He said, "No." "Well," I then said, "Why does Schwitofsky, about whom you wrote to me as the man who is innocent, and who is charged with being your accomplice, call you *Hoffman?*" "Oh," he said with a smile, "I remember now. I have been called 'Hoffman,' having been mistaken for a man of that name, but I had forgotten that fact when you asked me."

It was quite clear that there was something very suspicious about the pretext of both men that they were unacquainted with each other, and I determined to move in the case with great caution.

I may remark, however, that the fact that there were discrepancies in their narratives and that they were obviously telling me falsehoods in minor particulars was not in itself conclusive. Men of their type cannot tell the truth even when they wish to, and had there really been collusion and agreement between them there would have been no discrepancies in their statements.

I took the course of speaking to each man separately on a number of occasions and making them repeat their stories frequently, pretending that in the press of business my mind was not clear as to the particulars. They minimized the obvious mistake they had made in pretending not to know each other and being in doubt about the names, but the main features of their stories remained unshaken. Gelsky asseverated with the utmost solemnity, over and over again, that Schwitofsky was not the man who had gone to Dale to demand payment of the bill for $100; that he had made a pretence of identifying the portrait under physical duress; that he was beaten by a police officer for having positively denied that Schwitofsky was the man, and that he was in fear of further assault when he made the pretended identification. The real accomplice had left the very afternoon of the affair in Dale's house (that is, the 19th of January, 1911) for Chicago, saying that New York was now 'too hot' for him. Schwitofsky, on the other hand, could only account for his arrest by saying that he, having worked for a private detective agency during the Cloak Makers' Strike in 1910, and having entered all the vouchers for payments, had ascertained that two plain clothes men were on the payroll of Silverman's Private Detective Agency, receiving from that organization a certain sum of money daily while they were in the employ of the City, and that the fear that he might divulge this impropriety had led these plain-clothes men to determine that he be put away under conditions which would prevent him from revealing their wrong-doing.

In the meantime, Schwitofsky had been arraigned before Judge Warren W. Foster of the Court of General Sessions, and had pleaded "Not Guilty." In aswer to the usual formal question he had stated his lack of means and his consequent inability to employ counsel, and the Judge had assigned Counsellor William D. Bosler, a

former Deputy District Attorney, to his defense. It is characteristic of Schwitofsky that he told me that he had no counsel, although it is quite possible that in the bewilderment attending his arraignment he had not noticed that counsel was assigned to him. I took Schwitofsky's word that he was without counsel and asked my friend, Mr. Mark Eisner, now the prominent Assemblyman, and at this moment actually counsel for Schwitofsky on the appeal which may yet be taken, to defend him. I told Mr. Eisner of the circumstances of the case which made me desire to have it treated with particular care, the main reasons being that Dale was the complainant in both instances; that the charge against Gelsky, while nominally that of "attempted extortion," really involved a suspicion of the worst kind of moral turpitude on the part of Dale; that Gelsky insisted that his "enforced" identification of Schwitofsky was what led to Schwitofsky's arrest, and that there was a possibility that Schwitofsky's story of his innocence might, in consequence, be quite true.

When, however, Mr. Eisner sought to enter appearance for Schwitofsky he found that there was already a "counsel of record," Mr. Bosler. Schwitofsky, however, said that he did not desire to have Mr. Bosler act for him, because in an interview with Mr. Bosler that gentleman had told him that he was in no position to investigate the story, and had immediately concluded that he must be insane because of a previous incarceration in Matteawan, the State Institution for the Criminally Insane. However, he said I need not exert myself to procure counsel for him, because Mr. Kimball, the agent for the New York Prison Association, had undertaken to provide a substitute counsel. When I spoke to Mr. Kimball he verified this statement but told me that the Austrian Consul (Schwitofsky being supposedly an Austrian citizen) had undertaken to provide counsel, and therefore

there was no necessity for the one he had proposed to furnish.

As time went on I noticed that Schwitofsky showed signs of increasing and extreme nervousness, his hands constantly shaking when talking of his wrongs and his voice stammering. I had more than once to check him and ask him why he shook so; to tell him that there was no reason to fear, and that he would be properly looked after and justice would be done to him. The attempted reassurance did not seem to have any very mollifying effect on his condition.

Mr. Kimball, like Mr. Hanley, seemed to feel that Schwitofsky was probably innocent. Schwitofsky, if I remember rightly, had been paroled to his care and had to report to him. He, like Mr. Hanley, declared that he had never met a man who seemed so anxious to keep straight and earn an honest living. This opinion of Mr. Kimball, who is a man of great experience and the Dean of Parole and Probation Officers in New York City, was not without its effect in inducing me to regard Schwitofsky as probably innocent.

I learned that Mr. Bosler, the counsel of record, had made up his mind that Schwitofsky was insane, and had applied to Judge Foster for a Lunacy Commission to investigate Schwitofsky's mental condition. *En passant* I may remark that Judge Foster is noted for his reluctance to appoint such commissions, in which particular he differs from some of his brother Judges. These commissions are expensive and seem frequently to be regarded only as a means of exercising patronage by the judges. Some of them, however, when they believe that there may be insanity, prefer the alternative course provided by the law and hold a Jury trial as to the mental condition of the accused. Judge Foster, before he decided to deal with the application of Mr. Bosler, instructed Dr. McGuire, the prison physician, and Mr. Kimball to

report in the matter. Both considered Schwitofsky sane. Judge Foster therefore, on the 8th of March, 1911, denied Mr. Bosler's motion.

In April Schwitofsky was again arraigned before Judge O'Sullivan, who assigned Mr. William H. Carpenter as counsel in the case, and on April 27th, counsel, on behalf of the defendant, pleaded "Not Guilty," accused being insane. On the same day a Commission in Lunacy was appointed by the Judge.

On May 19th the Commission reported the defendant to be sane, and the trial took place on June 1, 1911, when Schwitofsky was convicted of Burglary in the Second Degree and Assault in the First Degree, as 'Second Offenses.'

When I learned that Schwitofsky's case was to come up for trial on June 1st I made an attempt to speak to Judge O'Sullivan about the case, but was not successful in being able to meet him at a moment when he was disengaged. I therefore made an appointment with the Judge to meet him on the Monday morning of the week of the trial and talk over the case with him. It so happened that that was the week of the Jewish Feast of Pentecost, and I found myself unexpectedly prevented from keeping the appointment by business arising out of the arrangements in connection with the Pentecost services at my Temple. I therefore wrote the following letter:

31st May, 1911.

My dear Judge O'Sullivan:

The approaching Jewish Feast of Weeks (Pentecost) makes this a very busy season for a Rabbi. A mass of details in connection with the services detained me so late last Monday morning that I was unable to keep the appointment made with your Honor last week.

As I fear that I may not find time for a personal interview I have decided to address this communication to you. I do so with considerable misgiving, being fully aware of the extreme impropriety of attempting, or appearing, to discuss a case with a Judge before trial. Yet there may arise so peculiar a concurrence of facts that the best interests

of justice seem to demand that the Judge be informed of all the circumstances from the first.

On your calendar for today is the case of Alfred Schwitofsky, alias Gerber, etc., charged with Burglary (?).

In my experience as chaplain of prisons it is an everyday occurrence to hear prisoners stoutly maintain that the charge against them is a "frame-up"—the outcome of malice or blundering on the part of the police. Of course, it is my rule to pay no heed to such statements.

But in the case of Schwitofsky there are certain unusual aspects:

1. Schwitofsky, or Gerber, was nearly successful some years ago in an attempted suicide, brought about it would seem by despair at a sentence for a felony; and was in Matteawan for some time.

2. According to the statement of a credible witness he made an earnest attempt to earn an honest livelihood after his discharge. He was doing well as an electrician when the roguery of a contractor ruined him. Thereafter, he tried to earn a living as an employe of a private detective association.

3. According to the newspaper accounts he was arrested in the present instance in the streets on sight because of his record and the general distrust the police entertained about him; and the present charge was made after his arrest and his transference from Special Sessions to General Sessions at the application of the District Attorney.

4. I am told that the complainant in the present indictment was also the complainant—Theodore B. Dale, of 71 West 45th Street—in indictment No. 81381 found against Leo Gelsky, alias Hoffman, whom you sent to Elmira for attempted blackmail on 11th April last.

5. Gelsky never attempted to deny that he wrote the blackmailing letter which formed the ground of the charge against him, but constantly maintained that he was justified in sending that letter as the statement in it was true, and he was entitled to the money demanded:

6. Gelsky confided to me that after his arrest the officers brought pressure to bear on him to identify Schwitofsky as an accomplice. When he declined to do so, he states, he was beaten until he yielded. He appeared to be unaware that Schwitofsky was charged with a different offense.

7. It is rumored that the officers who arrested Schwitofsky did not retain the confidence of their chiefs.

8. Schwitofsky maintains that certain members of the detective force are bitter against him because he can prove from his own knowledge that while they are in the employ of the city they accept payment for their services from a private detective organization.

It is but right to say that both Schwitofsky and Gelsky are old offenders. Schwitofsky, while not insane in the legal sense, is cer-

tainly not normal. I should judge him to be crafty in an unusual degree. Gelsky made what I believe to be a lying pretense that he had not previously been acquainted with Schwitofsky.

I beg you to read over the evidence before the Commission in insanity which you appointed on this man.

Yours very Faithfully,

JACOB GOLDSTEIN, Jewish Chaplain, "Tombs."

On June 5, 1911, Schwitofsky was presented for sentence before Judge O'Sullivan, who in sentencing Schwitofsky, said:

"The Court is in no position this morning with regard to this man's sentence to give him any consideration except that which goes above the lowest sentence which can be imposed. As you will understand the law provides that in a case like his, where a man has been convicted of an offense as a second offense, such person must be sentenced for a term not less than the longest term prescribed by a first conviction. This man for a number of years past has been living in prison both in this State and in other States.

"Somebody has said that the inmates of a prison are divided into two classes, one class which should never be in prison and the other class which should never leave. I think he belongs to the second class. There is no use losing your time or mine. He should be working out his sentence now. . . . . ."

His Honor, of course, was within his rights in making these or any similar remarks that expressed his honest conviction and his personal view of the case, but it must be remarked that there was unconsciously some misrepresentation in the characterization of the accused. It may have been literally true that for a number of years past Schwitofsky had been "living in prison," but it was most unfair to charge against the man his detention in an institution for the insane. As a matter of fact, with the exception of the very first sentence in the Eastern

Penitentiary of Pennsylvania on a charge of Grand Larceny, the commission of which crime Schwitofsky always admitted, those who have investigated his story are by no means sure that Schwitofsky really was guilty of any other crime.

It may be noted as a legal fact that the previous commission of a crime in another State does not make the accused a "second offender" in this State.

The question of Schwitofsky's guilt or innocence in connection with the other charges in this State I will not here discuss, but it would seem that the only serious charge against Schwitofsky, previous to the present one, in this State, was that he had committed burglary on the premises of Elmer J. Ellsworth of 9 E. 98th Street. Out of this burglary arose his arrest on the 7th of March, 1908, and the alleged finding on his person of a loaded pistol and certain burglar's tools. Schwitofsky states that the "burglar's tools" were implements he needed in his calling of electrician, and while he admits that he had a pistol on him at the time of his arrest, it was unloaded and newly purchased, and was wrapped up in a paper parcel. He had purchased this pistol for his own protection as a householder. It must be remembered that the date of this charge was antecedent to the passing of the Sullivan Law, which makes the possession of a pistol, loaded or unloaded, without a special permit, a felony.

Without entering, however, into this question, the discussion of which I will leave to Mr. White, there is no other charge in this State against Schwitofsky. That there was a strong feeling in the mind of Judge O'Sullivan against Schwitofsky is quite clear from the remarks above quoted. The late Judge O'Sullivan was a man of high principle, a devoutly religious-minded man. I have never dreamed of questioning the sincerity of his conviction of Schwitofsky's guilt, and any remarks that may be made by me about his conduct of the case must always

be understood to admit his honesty of purpose and conscientious belief that he was right in what he did.

The sentence of Schwitofsky was ten years for each charge, the second period of ten years to begin at the expiration of the first period. In other words, Schwitofsky was sentenced to twenty years' imprisonment.

The commitment papers transferring Schwitofsky from the Tombs to State's Prison were not signed till the 17th of June following, that is to say, twelve days elapsed between the sentence and the transference of the convicted to Sing Sing. In the meantime I heard that a certain Mr. Frank Marshall White, a newspaper man, whose attention had been drawn to the case, had been told that I had been actively interested in Schwitofsky, and that I should be in a position to give him helpful information in the matter. Mr. White left a message for me that he would like to speak to me about the case. It may be news to Mr. White that before I replied to his message I made private inquiry as to his standing in the newspaper world. I was assured on good authority that he was a man of the best standing in the world of the higher class of newspaper writers; that he had occupied positions of the greatest prominence, and that his character was altogether beyond suspicion. I wrote to Mr. White and we met, and there began an acquaintance between us which has ripened into intimacy, and I am pleased now to count Mr. White among my closest and dearest friends. I leave him to take up the story of our Odyssey to aid Schwitofsky. He did remarkable work at a great sacrifice of his time and personal means, and the strong case now built up to prove Schwitofsky's innocence is in the greatest part the result of his indefatigable and successful endeavors.

Mr. White and I early became convinced that there had been a miscarriage of justice, and resolved to prosecute the matter until we had freed Schwitofsky. It must be

obvious to the reader that the really important point in our case revolved about the character of the complainant, Theodore B. Dale. This man, now deceased, was at the time a successful ladies' tailor, who had carried on a business at 71 West 45th Street. He was said to be a man of considerable means. I soon learned that his reputation was most unsavory, but could find nobody who was prepared to make any definite public statement about it.

When Mr. White, after the lapse of some months, showed me the result of his investigation, it seemed pretty certain:

A—That Schwitofsky was not the man involved in the dirty business that led to the charges at all.

B—That the burglary "in the second" was not committed at all except in a very technical, legal sense, and it is quite arguable that it was not committed by anybody.

C—That felonious assault in the first degree was positively not committed at all by anybody.

Mr. K. Henry Rosenberg, the well-known and very capable criminal lawyer, very kindly undertook to prosecute the Appeal in Schwitofsky's behalf. The first appeal was to the judge himself to grant a new trial on the ground of newly discovered evidence. This appeal was heard in April, 1912, and Judge O'Sullivan denied the motion for a new trial.

We were considerably staggered by this action of the Court, but were not contented, and on the 19th of March, 1913, an Appeal was taken to the Appellate Division of the Supreme Court of the State, both against the whole sentence and against the Judge's denial of the new trial. Through the good offices of Mr. Orlando Lewis, of the Prison Association of New York, Mr. Francis D. Gallatin prepared the brief as Counsel for Schwitofsky, and Mr. White was successful in securing the services of Mr. Samuel Untermeyer, one of the most eminent lawyers in

the country, who argued the case before the Supreme Court. Both the lawyers, convinced of Schwitofsky's innocence, very generously did their part free of cost to the accused. Mr. Untermeyer, indeed, not only gave his valuable time and talents to the case, but also sent a subscription toward the necessary expenses.

On the 4th of April, 1913, the Appellate Division denied the Appeal without stating any opinion, there being one dissentient, who also failed to give his reasons.

Just when the Appeal to the Appellate Division was on the point of being argued, I had the astonishing experience of finding Theodore B. Dale in the Tombs Prison (as I verily believe, in the identical cell in which I first found Schwitofsky) on a charge of "Soliciting." It appears that on the 16th of December, 1912, a lad of seventeen, named Jack Young, who described himself as an actor, was accosted by Dale in the Subway near 110th Street; that Dale, under pretext of providing him with employment, took him to the house where he was then resident, 23 West 126th Street, and that there took place an attempt at a crime almost identical with that experienced by Leo Gelsky in 1911. Dale was held in $500 bail to answer the charge before the Court of Special Sessions. On January 24, 1913, he pleaded "Not Guilty," and when the case was called on the 31st of January, 1913, it was shown that he had absconded from the city and his bail of $500 was forfeited. He returned from San Francisco, whither he had fled, and presented himself before the Court of Special Sessions February 28, 1913, and pleaded "Guilty" to the charge. It was while he was awaiting sentence on this charge that I saw him in the Tombs, and in the course of conversation he admitted that he was the same Theodore Dale who had prosecuted Schwitofsky. On March 11th his plea of "Guilty" was, by permission, withdrawn. He pleaded "Not Guilty" and was held in $1,000 bail for trial. On the 18th of

March, when his case came up, he was again absent, and it was shown next day that he had committed suicide rather than face the trial.

No one with the slightest humanity in his composition can deny that Dale's death was in a measure an expiation for his offenses, but while the innocent victim of his wrong-doing remains incarcerated it is impossible to refrain from stating in plain terms—without rancor or spite—that the poor, half-insane wretch, Dale, was a well-to-do degenerate who was a centre of mischief, immorality and perjury while he yet lived on earth and whose evil deeds survive him.

It will be seen that the character of Dale was of so black a description that all doubt as to the possible truth of Gelsky's story as told in his confession to me, previously embodied in this statement, can be dismissed, and that in consequence the presumption of Schwitofsky's innocence becomes almost a certainty.

JACOB GOLDSTEIN.

The Journalist's Story.

AN OPEN LETTER TO THE JUDGE.

A résumé of the results of my investigation in the case of Alfred Schwitofsky, up to the time of its publication, may be found in an open letter to Judge O'Sullivan that appeared in *Fair Play* on Saturday, July 27, 1912. Since that time Dale has committed suicide, after confessing that it was on perjured testimony that he sent Schwitofsky to 20 years in prison, and Judge O'Sullivan has died. The publication of my letter to the judge (as set forth in that document) rendered me liable to punishment for contempt of court or for criminal libel, had I in the slightest degree overstated the case against him, but he permitted my censure of his conduct to pass unchallenged. The letter in part ran thus:

"I appeal to you, Thomas C. O'Sullivan, as a man alive to his individual responsibility to his fellow men, as a tribune of the people under oath to administer justice, as a communicant of the Roman Catholic Church that teaches that every human creature must one day render an account of himself before God, to undo a grievous wrong resulting from a miscarriage of justice in your part of the Court of General Sessions. As a result of this miscarriage of justice a man innocent of the crimes of which he was convicted before you is behind the walls of Clinton Prison under a twenty-year sentence; his wife, a frail woman, forced to support herself and child, has only recently left the hospital where she was compelled to go after a physical breakdown, and is again toiling for a livelihood on the verge of nervous prostration from worry and suspense, her child, at an age when children most need a mother's care, an object of charity.

"You have once before had the opportunity to right this wrong, and whether or not the course you pursued on that occasion was a deliberate denial of justice I shall leave it to the readers of this communication to determine.

"You, Judge O'Sullivan, are aware, as I am, that if in this letter I overstate the case against you one iota it is within your power to inflict condign punishment upon me. My sole motive in bringing this matter again before the public is to see justice done to a fellow creature. I have been told that my assiduity in this direction has been sneered at in certain quarters as due to an effort to make circulation for this magazine through an attack upon a judge. That idea is refuted by the fact that the investigation, whereby I have proved the victim in this case to be innocent of the crimes of which he was convicted, was concluded and the application for a new trial made for him, before the magazine came into existence.

"Does not the fact that I *know* an innocent man to be undergoing a twenty-year prison sentence constitute a sufficient motive for me to demand justice for him?

"Shall I, after many weeks of uncongenial labor to prove that this man is not guilty of the crimes for which he is being punished, remain mute after you, Judge O'Sullivan, have contemptuously ignored the proofs of his innocence I have been the means of bringing before you.

* * * *

"It seems to me, Judge O'Sullivan, that the circumstance that such a man as Dale was behind the arrest in the instances of both Gelsky and Schwitofsky was a sufficient reason in itself to cause you to exercise extraordinary care at the trial of the latter. I can easily understand, nevertheless, that believing Schwitofsky to be of the same perverted breed as Gelsky and Dale, you might consider that it did not matter much what happened to him. In fact, I rather suspect that that may have had something to do with your conduct of this case.

* * * *

"In obtaining the evidence disproving Schwitofsky's guilt in the Dale matter I found reason to believe that his charge that he was a victim of police persecution was true. Consequently it became necessary to take up the matter of his arrest in Harlem in March, 1908, as the result of which he had served a sentence of six months on conviction for carrying concealed weapons, spent more than two years in the Manhattan Asylum for the Criminal Insane, and then had pleaded guilty to a charge of having had burglars' tools in his possession on a promise of suspended sentence.

"In the pursuit of this inquiry I have examined and cross-examined —with the consent and approval of Commissioner Waldo—every policeman and detective, who is on record as having had anything to do with Schwitofsky since he came to New York after finishing his term in the Eastern Penitentiary in Philadelphia, including Lieuts. William H. Kinsler and William W. Duggan, whom he accuses of being at the bottom of all his recent misfortunes. I have examined all police records of the various arrests of Schwitofsky—with startling results. I have interviewed the victims of his alleged crimes. I have cross-examined

Gelsky in the Elmira Reformatory, and I have traced back Schwitofsky's career as he outlined it to me in prison from the time of his last arrest to his arrival in New York in the fall of 1907, visiting the places at which he had lived and his former places of business and looking up and talking with his old acquaintances.

"As the result of this investigation (of which I have previously furnished you, Judge O'Sullivan, with full details) I am convinced that Alfred Schwitofsky has endeavored to lead an honest life since he finished his term for the one crime he admits having committed, and I believe that his present unhappy plight is due to police persecution, as he has maintained all along. The facts upon which I base these conclusions have already been set forth in this magazine, and not one fact or one deduction from facts has yet been disputed.

* * * *

"The circumstance that Schwitofsky bore on the *inside* of his *left* wrist incised scars made three years before with a sharp instrument, when he had attempted suicide in the Tombs prison by reason of his earlier misfortunes, and that Deputy Assistant District Attorney McCormick was permitted by you to lead the jury to believe that those scars were the ones that had been made by Harold on the occasion of the alleged burglary at Dale's house, brought about the miscarriage of Justice in your court in June, 1911.

"Why, Judge O'Sullivan, did you refuse to allow Schwitofsky to explain to the jury how he came by those scars?

"You had the opportunity to right the wrong done Alfred Schwitofsky, when the application was made before you last January for a new trial. There were only five short affidavits to be considered—one made by Frank Harold, to the effect that he had stopped the alleged Dale burglar and dug the skin from the back of his right wrist and that the revolver he had taken from him contained only two blank cartridges; one from Detective Edward J. Cousin, who took the revolver from Harold to the police property clerk, and who corroborated Harold's testimony that the cartridges it contained were blank; two from Dr. Julius B. Ransom, a medical practitioner of 30 years' standing, who examined Schwitofsky's wrists on two separate occasions and made oath that the skin had not been broken within five years, and one from Gelsky, who swore that Schwitofsky was not the man who had accompanied him to Dale's house on the morning of the alleged burglary, and that he (Gelsky) had under coercion assisted the police to "frame up" the evidence against their victim.

"In spite of the fact that the affairs of a potentially innocent man in prison ought under the most primitive rules of justice to be expedited, you, Judge O'Sullivan, took seven weeks to consider these affidavits, and then in denying Schwitofsky a new trial practically ignored them. You did not even claim as a hard and fast proposition that Schwitofsky was guilty of the crimes for which he is being punished.

You merely said that in your opinion the prisoner was fairly tried and that you regarded the verdict of the jury a just one; that the lawyers assigned to defend him "had ample time to acquaint themselves with every phase of the case," and that you believed that they "were familiar with all the facts and circumstances and could have adduced the testimony upon which it is now sought to obtain a new trial."

"In other words, because Lawyers Keir and Carpenter, whom you had appointed to defend Schwitofsky, had refused to look up his witnesses or to prepare his defense, you are willing that an innocent man should spend 20 years of his life in prison. Is that the law of the Court of General Sessions, Judge O'Sullivan? If it is, any judge of that court has it in his power to railroad a penniless citizen to prison for as many years as he likes. All that the Judge with such a purpose will need to do is to secure the indictment of his victims on a trumped-up charge and assign any of the shysters about the criminal courts to defend him, with private instructions not to produce his witnesses. Then when the victim is convicted and sentenced, the judge may deny an appeal for a new trial on the ground that his lawyers were familiar with all the facts and circumstances and could have adduced at the first trial the testimony upon which it was sought to obtain a new trial.

"And now, Judge O'Sullivan, what do you propose to do in this matter? Will you allow Alfred Schwitofsky, who has already been imprisoned more than a year and a half for crimes which he did not commit, to suffer for additional months until his case can be passed on by the Supreme Court, during which period his wife may become insane or even die (I do not exaggerate her mental and physical condition in the least), or will you reconsider now a new trial for him?"

"Your conduct of the Schwitofsky case is not going to add to your reputation in any event, Judge O'Sullivan, but the longer you allow an innocent man to lie in a prison cell while his family suffers, the greater will be your sin in the eyes of God and of the community in which you dwell."

THE PRISONER.

On the occasion of my first visit to Schwitofsky, I found him in a pitiably neurotic condition, as he was indeed on the occasions of my subsequent visits. His emotion was such that his words ran over one another alternately with periods of stammering, while his hands trembled with increasing violence as he told the story, that was frequently interrupted by tears, of his alleged wrongs and their culmination. As he had spent the best part of the last 8 years in prisons and hospitals, and

was contemplating 20 more years like them, his weakness may scarcely be considered unaccountable. Schwitofsky is a very small man—only five feet and half an inch in height. He is of pronounced Slavonic type and speaks English with a foreign accent, for tho he was born in the United States he was taken to Austria, the home of his parents, when only two years of age. He is an electrician by profession and a man of intelligence and education, who speaks several modern languages and is capable of a Latin quotation on occasion. While he admits the commission of a crime in 1903, and that owing to circumstances that he was not always able to control his associations in New York have not been of the best, he claims that he has kept within the law since he served his term of punishment. My investigations convince me that he is a victim of police persecution. I believe that he was put in prison by a police "frame-up."

POLICE PERSECUTION.

Sentence was suspended in Schwitofsky's "framed-up" Harlem burglary case in August, 1910. Leaving the Tombs penniless, he was befriended by a barber who had been his neighbor in 117th Street, until he found work with Louis Berlion, an electrician doing business in 2nd Avenue. During his first week with Berlion he was accosted in the street by two detectives who had seen him in the "line up" at police headquarters, on the way with his bag of tools to do a job for his employer. Under the impression that he was beyond the power of the police as a paroled prisoner earning an honest living, Schwitofsky was rash enough to defy the detectives and to enjoin them to take word to his persecutors, Kinsler and Duggan, that he was going to "get even" with them. At the end of the week Berlion discharged him, giving as his reason that he did not "want any trouble with the police."

Schwitofsky next got work in a garage, and by October had saved money enough to open an electrician's shop of his own at 19 and 21 Second Avenue. Here he prospered until he took a contract to put up a big electric light sign at 6 and 8 Doyers Street, in Chinatown, on which he did two weeks' work with several workmen, only to be swindled out of payment. He was ruined pecuniarily and compelled to close his shop. He says that while he was at work in Doyers Street, Kinsler, Duggan and another detective, William Brown (who afterwards arrested him in the Dale case) one day came upon him and denounced him as an ex-convict in the presence of his workmen. On this occasion he went to Judge Swann's chambers in the Criminal Courts building and reported the occurrence.

Out of work again and unable to find employment at his trade, Schwitofsky secured a position with Isaac Silverman, head of the Fidelity Secret Service Bureau, where he says that he discovered that his old enemies, Kinsler and Duggan, were taking pay from Silverman for work they were surreptitiously doing in connection with the cloak makers' strike that was then in progress, when they should have been on duty for the city. It was his threat to expose these conditions, Schwitofsky believes, that brought about his present predicament. It should be understood that he was contumacious and aggravating in his treatment of the two detectives, not manifesting the deference that a man who has been in prison is supposed by agents of the law to show them. It was unwise for him to threaten to report Kinsler and Duggan to Police Commissioner Bingham for taking money from Silverman. The day after he made this threat, he says that he was accosted in the street by Detective John F. Talt, also of the Central Detective Bureau, who said to him:

"You've gone the limit. Now you take my advice and

get out of the city within 24 hours, or we'll send you up for good!"

It is Talt who is accused by Gelsky of coercing him into falsely identifying Schwitofsky as the Dale burglar.

PROBABLE INNOCENCE.

The circumstance that Schwitofsky's wrist did not bear the marks of the finger-nails of the chauffeur at the Hotel Webster was conclusive proof to my mind—without the additional evidence I secured later—that he was not the man who had invaded the tailor's shop on the morning of January 19th. On making inquiries I found that there were at least four men in a position to form accurate opinions, who had grave doubts as to Schwitofsky's guilt—Rabbi Goldstein, the Jewish chaplain of the Tombs; Mr. Kimball, of the Prison Association; Mr. Strisik, of counsel for the Austrian Consulate, and John Hanley, then deputy warden of the Tombs. Rabbi Goldstein had put his views in the matter on record in the letter to Judge O'Sullivan, that was on file with the rest of the Schwitofsky dossier in the office of the clerk of General Sessions. Mr. Strisik's investigation in the case during the brief period that he had it in hand had led him to believe that there was strong probability of the prisoner's innocence.

Mr. Kimball and Mr. Hanley did not believe that Schwitofsky was the Dale burglar, because they knew of his efforts to make an honest living during the period between the suspension of his sentence by Judge Swann in August, 1910, and his arrest in February, 1911. The little electrician had made a point of calling, sometimes as often as twice a week, on the agent of the Prison Association in the Criminal Courts Building and on the deputy warden of the Tombs, to let them know how he was getting on.

"I never knew such a change in a man as appeared in Schwitofsky from the time he was half crazy with anxiety and suspense in the Tombs and afterward, when he became a free man and began for a time to prosper," says Mr. Kimball. "He would fairly beam with pleasure when he came into my office to tell me of a contract he had secured, or of the purchase of new tools. If he was leading a 'double life,' and working ten or twelve hours a days as a cover for burglary at night, he is the first crook to do so in my experience."

Mr. Hanley had definite information that made him believe that Schwitofsky could not be sure of a square deal from the police, that went back to his arrest in Harlem. Three days after he had been taken into custody in Lenox Avenue Schwitofsky had been "lined up" with a dozen other inmates in the Tombs, and Kinsler and Duggan had brought in several householders, men and women, from whom property had recently been stolen, to ascertain if they recognized any of the prisoners as persons they had seen in the vicinity of houses that had been robbed. *On this occasion Hanley had detected Duggan surreptitiously pointing out Schwitofsky to a woman as the person he wished her to identify,* after she had previously indicated an Italian as the man she had seen in her apartment. The deputy warden had *made a memorandum of this circumstance* in the identification book at the Tombs, and is prepared to produce the book in court and give his evidence whenever they are called for.

THE JUDGE INTERVIEWED.

All things considered, I felt justified in laying before Judge O'Sullivan the information I had gathered with regard to Schwitofsky. I found that the judge was cognizant of all the circumstances.

"Schwitofsky was ably defended," he told me. "Mr.

Carpenter, the first lawyer I assigned to the case, has the respect of the judges of General Sessions, and Mr. Keir, whom I asked to assist him, is a brilliant advocate. The prisoner was found guilty after a fair and impartial trial, and the sentence of 20 years is the lightest I could impose on him as a second offender."

Judge O'Sullivan thought that Schwitofsky had not treated his lawyers with sufficient consideration, and said that they had found him a difficult person to deal with. As an abstract proposition the prisoner ought, of course, to have maintained a bland and cheerful front when the legal gentlemen declined to look up his witnesses and his chances for regaining freedom fled before him. Schwitofsky's recent experiences may, however, scarcely be said to have been favorable for the cultivation of optimistic serenity.

Inspection of the papers in the Schwitofsky case in the clerk's office of the Court of General Sessions showed that the prisoner himself had brought certain conditions to the attention of the judge. I found two of his letters on file, one written the day after he had been found guilty, and the other several days later when sentence had been pronounced. The latter was as follows:

A CRY FROM "THE TOMBS."

New York, June the 8th, 1911.

Hon. Judge O'Sullivan:

If your Honor pleases, I beg to state that on the date sentence was imposed on me Attorney Mr. W. G. Keir had pleaded contrary to my wishes. I did not ask for the clemency of the court, but I did ask for a fair and impartial trial, which I did not receive. Your Honor did not give me the least opportunity to tell my story of police persecution, which goes back as far as 1907. This

I am able to prove if investigated. Your Honor also denied the motion wishing to explain how I got those scars on the front of my left wrist after the District Attorney had used them against me towards the jury, stating that those are the cuts from a chauffeur's finger nails. I could have proven by reliable witnesses and records that I have had them since 1908.

I again repeat, having no one to investigate my case and no means to obtain competent attorneys in the beginning is the cause of my going to prison an innocent man. From a bench of Justice your Honor announced that your Honor had provided me a competent attorney, and that I had had sufficient time to prepare for trial. The first I rejected, the second I rejected; then your Honor has assigned the attorney to conduct my case.

My first attorney, Mr. Bosler, assigned to me by Hon. Judge Foster, declared me insane as soon as he found that I had no means and had been confined in Matteawan. Hon. Judge Foster appointed Dr. McGuire and Mr. Kimball to inquire into my sanity. I asked Mr. Bosler to investigate several matters concerning my case. To this he replied: "What! Do you think I am going to spend my time and money on your case, when there is nothing in it for me? I will defend you as an officer of the court whenever you are going to be tried."

I leave it to your Honor's judgment if I rejected Mr. Bosler wrongfully. Mr. Carpenter, the second attorney assigned to me by your Honor, called on me five minutes previous to my arraignment before your Honor. Mr. Carpenter declared me insane. Speaking to him about two minutes, he withdrew the plea and entered a plea of insanity. At no other meeting of the Commission but the first was Mr. Carpenter present, and I did not see him until May 24. At that date I explained my case to Mr. Carpenter. The 28th May I was to be placed on trial, and I asked Mr. Carpenter if he knew my case.

To this he replied: "From A to Z." I then requested him to tell me on what charge I was arrested and held by Judge O'Connor in the Police Court. He said that I was arrested on a charge of grand larceny. It was then I told Mr. Carpenter: "How are you going to defend me, if you don't know the beginning of my case?" He informed me that he is going to get out of my case, and I should ask for another attorney. To this I consented. Your Honor denied Mr. Carpenter's motion, and assigned Mr. W. G. Keir. I had but 15 minutes or so to prepare for trial. Mr. W. G. Keir, the less informed counsel, tried the case, while Mr. Carpenter drawed all sorts of pictures. At the end Mr. Carpenter summed up and pleaded for me, being unfortunate, he pleaded for mercy, clemency, everything but facts. How could he? A prisoner could not do two things at once. This I also leave to your Honor's judgment.

I do believe that if Mr. W. G. Keir had had time to investigate my case I would have been defended properly. Since my conviction I received a letter which, if investigated, will reveal the truth. Having no one to do so, I ask in the name of justice that you assign Mr. Kimball to investigate this letter. Your Honor it is impossible for me to think that by a court of justice an innocent man could be sent to prison, but I trust in God that he will not allow me to suffer very long. There could be *only one true story* to a case, but the minutes of my trial will show that every witness had committed perjury, except the one from the Telephone Company. May God forgive those who have put this sorrow upon me. I cannot.

Hoping and trusting that your Honor will grant my request and assign Mr. Kimball to investigate my case thoroughly, I remain

Obediently yours,

ALFRED SCHWITOFSKY.

A "FRAME-UP"?

Sentence had been pronounced on Schwitofsky on June 5th, but he had not yet been taken to Sing Sing on the 14th, the day I called on Judge O'Sullivan. This would mean in ordinary circumstances that some detail of his case was still under consideration by the judge. When, therefore, Schwitofsky was ordered to Sing Sing by O'Sullivan the day after my visit to him, and I was informed by Dr. Goldstein and Mr. Kimball that very probably it was my interference that had brought about the immediate execution of the sentence and perhaps prevented further official inquiry as to the prisoner's innocence, I considered myself in duty bound to continue my investigation.

This was the situation: If Schwitofsky was the innocent victim of a police "frame-up," which had its inception with Kinsler and Duggan, and Gelsky's story of coercion by the detectives who made the arrest in the Dale case was true, it was necessary to assume that Brown, Talt, Dungate and Donnelly, the detectives who brought about Schwitofsky's arrest on Gelsky's identification of his photograph, or one or more of the four, had taken advantage of the escape of the real criminal to "job" the little electrician as a favor to their two brothers-in-arms—unless, indeed, one or more of the quartette harbored a grudge against him. If Schwitofsky's arrest had been brought about by his two alleged enemies without the connivance of Brown, Talt, Dungate or Donnelly, or any of them, the only other hypothesis was that Dale had been influenced by Kinsler and Duggan to identify Schwitofsky falsely as the burglar of January 19th.

DEPUTY POLICE COMMISSIONER DOUGHERTY "HELPS."

My impression that there was at least a possibility that Schwitofsky was the victim of a "frame-up" being strengthened by the views of Dr. Goldstein, Messrs. Kimball and Strisik and Deputy Warden Hanley, I laid the matter before Police Commissioner Rhinelander Waldo. Mr. Waldo at once sent for Second Deputy George S. Dougherty, who had only recently come into the department from the celebrated Pinkerton agency and was then in charge of the detective bureau at police headquarters, and directed him to make a thoro investigation into all the circumstances surrounding Schwitofsky's arrest. In Mr. Dougherty's office I gave him the information in my possession with regard to the case, of which he made notes on both sides of several sheets of paper, professing a lively interest in it.

"I'll get some good men out right away," he said. "Let's see—this is Monday. Come in on Wednesday morning, and I'll report progress."

The Schwitofsky problem seemed to me as I left police headquarters that morning likely to have a quick solution. What with the famed Pinkerton finesse backed by the entire police power of New York, I looked forward to Wednesday with a view to the disclosure of some masterful detective work. It was a particularly propitious circumstance, I thought, that neither Waldo nor Dougherty had come into the department until after the occurrences to be investigated, since under existing conditions the latter might hew to the line regardless of the direction taken by his chips.

I was at Deputy Commissioner Dougherty's office promptly at the hour he had specified on Wednesday morning, but there was no adroit unraveling of a mystery to admire. The long arm of coincidence and the fat head of prejudication had become factors in the situation. It so chanced that Dougherty had been one of the detectives

to arrest Schwitofsky for the crime he admitted committing in Pennsylvania in 1903, tho he had not at first recognized the name.

"I remember that fellow well," Dougherty now declared. "He's a criminal type—the kind Lombroso tells about. He can never be anything else but a criminal."

I reminded the deputy commissioner that modern science discredited Lombroso in so far as recognition of the existence of a criminal type was concerned, but he was not to be convinced that he could be mistaken in his estimate of Schwitofsky formed eight years before, tho he had not seen or heard of him since until the present occasion.

I found that Dougherty had construed Waldo's instructions to investigate the circumstances surrounding the arrest of Schwitofsky to mean that Schwitofsky's guilt was to be proved to me. He had sublet part of the contract to Lieutenant Dominick Riley, who has since become a captain. Riley had ordered the attendance at the deputy commissioner's office that morning of Lieutenant Duggan —Kinsler being absent from the city on vacation—of Detective Brown, and of Scherer, the policeman who had appeared against Schwitofsky on the occasion of his arrest in East 12th Street. Inspector Weinthal of the Hoboken police department was also in attendance, by request.

Before the inquiry began Lieut. Riley did me the honor to take me into his confidence. He was the kind of a detective, he gave me to understand, who would not hesitate were it part of the day's work to fix a crime upon his own brother. He could not bring himself to believe that Bill Brown, whom he regarded as a brother, could possibly be guilty in the matter of a frame-up, he said, but nevertheless should duty call he would not shrink from expediting Brown's or any other policeman's course in the direction of prison or the electric chair. It seemed

altogether improbable to Riley, admitting that Kinsler and Duggan had annoyed Schwitofsky while he was at work in Doyers Street, that Brown should have been in their company, for (strictly between ourselves) he understood that Brown was not on speaking terms with either Kinsler or Duggan. As I had seen Brown and Duggan in amicable converse in the anteroom only a few minutes before, I was able to admire the subtlety of Lieut. Riley's method without being unduly influenced in its application.

When the Schwitofsky case was called before Deputy Commissioner Dougherty, one after the other of the witnesses told what they knew in the electrician's disfavor. I was allowed the privilege of cross-examination, but the only additional information I got was from Lieut. Brown. Brown said that after Schwitofsky's arrest he and Donnelly had taken their prisoner to the taxicab starter's box on the sidewalk before the Hotel Webster at 40 West Forty-fifth Street. It seemed that the chauffeur who acted as starter at the hotel had stopped the bogus telephone repairer when he ran from Dale's house further down the block on the morning of January 19th; had taken his pistol from him, and in doing so had torn the skin from the back of the man's right wrist, insomuch that he had afterward found particles of the other's cuticle under his finger nails. He had let the fellow go, however, and Brown's and Donnelly's purpose in now taking Schwitofsky before the chauffeur was that the latter might identify him as the man with whom he had had the struggle in the street.

"*If this is the man,*" said the chauffeur, according to Brown, "*he'll have the marks of my finger nails on his wrist all right. It was only ten days ago that I made 'em, but I'll bet that they'll last a year.*"

"Did he find the marks?" I asked Brown.

"I don't think he did," replied the detective.

"Well, how can Schwitofsky be the man the chauffeur

took the revolver from, if he hasn't got those marks?" I inquired.

"Perhaps he did have them; I'm not sure," said Brown.

On being further questioned, Brown finally said: "Well, I'll give the prisoner the benefit of the doubt; we didn't find any marks."

Reflecting before visiting his office that morning upon the brilliant detective work Deputy Commissioner Dougherty would probably perform in solving the Schwitofsky mystery, I had been particularly interested in the conjecture as to how he would go about ascertaining whether or not relations existed between the proprietor of the tailor's shop and Kinsler and Duggan or either of them. I was enlightened during the examination of Duggan.

"Do you know Theodore B. Dale of 71 West Forty-fifth Street?" demanded Dougherty in the course of his questioning.

"No, sir," responded Duggan.

When the policemen and detectives had gone Dougherty said to me: "Now you see, not one of these men knew what he came here for until I began to ask him questions, and each one answered every question asked him without hesitation."

I could only reply that if they were able to remember all the cases they had been involved in during the previous three years, including circumstances, dates, street numbers and hours and minutes, as well as they did that of Schwitofsky, each one was qualified to rival Macaulay in mnemonics. There is not the slightest doubt in my mind that each man had been informed what he was summoned to headquarters for, and that he had prepared himself for the ordeal—if it may be called that.

Left alone with the deputy commissioner and Lieutenant Riley, they seemed surprised and even a trifle hurt that I should still consider that there was any possibility

that Schwitofsky was not the Dale burglar, but they nevertheless inquired whether I could suggest further research. I thought that the character of the establishment at 71 West Forty-fifth Street might be ascertained with a view to more light on the subject under investigation, and that the chauffeur (of whose identity I was then unaware, and which I afterward established myself) who had stopped the escaping criminal and scraped the skin from his wrists, ought to be found. Dougherty and Riley agreed that that might be worth while, and I was instructed to come to headquarters again at noon on Saturday.

When Saturday noon and I arrived at police headquarters, Riley made his report. He had gone up to 71 West Forty-fifth Street the day before, announced himself as from the Police Department, and had asked Dale whether his house was reputable, afterward sending him out of the room and asking the same question of three of his employes. Dale and the others had one and all replied in the affirmative, and Riley had departed, having put the tailor on his guard as to a possible investigation of his premises, and thru him whoever might have been aiding and abetting him in offenses against the law. Riley had not been able to find the chauffeur, but promised to concentrate his intelligence upon the task at once.

KUHNE IN CHARGE.

Informing Commissioner Waldo of the manner in which Dougherty was conducting the Schwitofsky investigation, the matter was promptly taken out of his hands and put into those of Acting-Captain August Kuhne, the head of the Brooklyn detective bureau. In assigning this duty to him, Waldo told the acting captain in my presence that he was going to promote him to a full captaincy very soon, and in his delight Kuhne bubbled over with enthusiasm about the Schwitofsky case. The same evening, so he reported to me the next morning,

he and Detective Henry C. Dukeshire, also of the Brooklyn bureau, went up to Forty-fifth Street and, without discovering anything untoward, watched No. 71 from 9 o'clock until after midnight—altho I had informed him of Riley's diplomatic visit. That day Kuhne and Dukeshire obtained ingress to the house as building inspectors, and saw nothing wrong. They also looked up the parents of the seventeen-year-old seamstress who had testified at Schwitofsky's trial, and found them to be respectable, and that the girl had left her situation because of the notoriety attaching to the place after the burglar's visit.

A visit to the detective bureau at police headquarters had the effect of taking the edge from Kuhne's zeal in the Schwitofsky inquiry. "Bill Brown," said Kuhne to me the next time I saw him, "is one of the squarest men in the police department, and I am sure that he is incapable of taking part in a frame-up. I made him give me his honest opinion in the matter, and he said: 'If there ever was a man justly convicted of a crime, it is this Schwitofsky.' Brown says that Gelsky gave him the clue whereby he found Schwitofsky without the slightest suggestion on his part, and he simply followed it up and landed him. Donnelly and Dungate, who were on the case with Brown, were scarcely more than boys; they had just come into the detective bureau at that time and that was almost their first case."

Altho "scarcely more than boys," Dungate and Donnelly were first grade detectives, each something like thirty years of age, who might have learned some guile during the experiences that qualified them for the detective bureau. Everyone who knew Detective Brown seemed to have the same high opinion of him. I had first heard it expressed by Daniel E. Kimball of the Prison Association, who told me that in all the years that he had known that officer he had never heard a

complaint of unfairness against him from a prisoner. Brown himself said to me: "In the twenty-six years I have been on the police force, this is the first arrest I have ever made that has been questioned."

I was unable to induce Dougherty, Kuhne, Riley or Brown to take any interest in my theory that if the so-called burglar who threatened Dale and his servants with a revolver had had the skin torn from his right wrist by the chauffeur who took the weapon away from him, Schwitofsky must bear marks of the operation if he were the criminal.

And there the investigation ended so far as the detectives were concerned.

Dougherty, Kuhne and the others had dared to burke this investigation, in the face of specific orders from Commissioner Waldo himself, whom they knew to be anxious to learn the truth. The only alternative to the proposition is that they are dolts and bunglers—and that is not their reputation. They simply *would not* pursue an inquiry that promised to implicate in a crime any of their fellows in the police department, and they did what was in their power to give warning to all concerned that an investigation was on—as has been shown.

'THE JOURNALIST' TAKES CHARGE.

I now suggested to Commissioner Waldo that he turn the Schwitofsky investigation over to me, giving me power to examine those members of the force who had been concerned in the electrician's numerous arrests. Waldo at once instructed his secretary, Winfield R. Sheehan, to summon to police headquarters such members of the department as I might wish to interrogate, and to order them to answer any questions I might ask.

Up to this time I had not heard the name of Detective Talt mentioned in connection with the Schwitofsky case. I had been kept in ignorance of the participation in the arrest of Gelsky of that one of the four detectives en-

gaged in his pursuit who Schwitofsky asserts threatened him in the street, and whom Gelsky charges with having coerced him into the false identification of Schwitofsky as the Dale burglar! Talt was the last one of the quartette whom I questioned in the matter of the coercion of Gelsky, and I did not see him until two weeks after Commissioner Waldo had first set the investigation in motion. Before I had asked him a question, Talt volunteered the information: "I never heard that there was any trouble about the Schwitofsky case until a day or two ago, when Lieutenant Brown told me that you would probably ask me about Gelsky's arrest. He said that he hadn't mentioned the matter before because there was no use in my worrying as well as himself."

Why either of the detectives should have worried about an investigation in the Schwitofsky matter unless some phase of it was discreditable to them, is for them to explain.

Talt told me that his only commerce with Gelsky was to buy him cigarettes and to promise him help in his own difficulties with the law, provided he would assist the detectives in getting the Dale burglar. In his letter to Dr. Goldstein, Gelsky had said that Dungate was the man who had shown him Schwitofsky's photograph and declared that it had been recognized by Dale; but, as Dungate told me that he had not seen Gelsky since his arrest, I concluded after my talk with Talt that Gelsky —provided that he was attempting to tell the truth—had confused the two men, as both might answer the same general description. To straighten this and other matters out I visited Gelsky at the Elmira Reformatory, and had a half an hour talk with him in the presence of the head keeper of the institute, John D. Driscoll.

While a thoroly depraved young reprobate, Gelsky is an intelligent youth. When I suggested that he had mistaken Dungate for Talt, he said:

"It was Dungate that showed me the photograph. He and Talt are about the same size, but otherwise they are not much alike. Talt is older than Dungate, and is stuck on himself, while Dungate is a good natured, free and easy young fellow," which is a fairly good differentiation between the two.

GELSKY'S STORY.

Gelsky's account of the coercion incident is that he was alone in a room in the 57th Street courthouse, with Dale, the complainant against him, and the four detectives, Brown, Talt, Dungate and Donnelly. Here Dungate showed him the photograph, and told him that Dale had recognized it as that of his unwelcome visitor of January 19th, but did not pursue the subject further. Afterward Talt, who had been very attentive to him, and had purchased him cigarettes and promised to see that he was discharged on the blackmail complaint if he helped apprehend the Dale burglar, took him down to the cells. On the way his hitherto benevolent guardian suddenly made a violent assault upon him and threatened him with future chastisement, dire and awful, Gelsky asserts, unless he should promise to identify the Schwitofsky photograph as that of the bogus telephone repairer. Being badly frightened, Gelsky says, and having heard of prisoners being mercilessly punished in their cells by New York policemen, he made the required promise; and, when Brown came to his cell afterward he gave him the information that led to the capture of Schwitofsky at the Mills Hotel in Rivington Street.

Gelsky told me that he had previously seen Schwitofsky at the Mills Hotel, where he was known as "the checker fiend," by reason of his fondness for the game. He thought that he might have once played a game of checkers with him, but that would have been the extent

of their acquaintance. Gelsky's story of the alleged Dale burglary is that the tailor had given him a demand note for $100 on account of the injuries he had sustained on the occasion of their first meeting. He had tried several times to get Dale to pay the $100, without success, and on the morning of January 19th had given the note with a letter demanding its payment to a partner of his, and sent him to collect it. As Dale had become suspicious of strangers, the partner pretended to be a telephone repairer in order to obtain access to the house. His partner, Gelsky says, was about the size and build of Schwitofsky, but only 24 years of age. "*He* works with his brains," the youth said proudly, elevating him above Schwitofsky, who, as an electrician, works with his hands. Gelsky declared that he saw the gentleman who works with his brains off for Chicago on the morning of the day he (Gelsky) was arrested. "I wanted him to tackle Dale the second time," he said, "but he knew more than I did. He knew when to stop, and I didn't."

Gelsky told me that, knowing his partner to be beyond reach of the New York police, he described him accurately to the detectives before he was shown Schwitofsky's photograph. "I even told them about some weals on his arms," he said.

When Gelsky had been taken back to his cell, I asked Driscoll what he thought of the boy's story.

"He's a tough citizen, all right," replied the head keeper, "but he was telling the truth that time."

It was not until I was back in New York that the significance of the "weals" on the arms of Gelsky's partner, whom he claims to be the real Dale burglar, occurred to me. I at once wrote to Mr. Driscoll, asking him to inquire of Gelsky if he knew how his friend came by those weals. Driscoll replied as follows:

"Gelsky makes the following statement: 'That his partner after leaving the Dale home was stopped by two

auto drivers, and that he had a revolver up his sleeve which he dropped in an apartment telephone booth. This gun caused the 'welt' or 'weal' on his partner's wrist, he thinks."

By the "apartment telephone booth" Gelsky means the taxicab starter's little office on the sidewalk in front of the Hotel Webster. The "weal" or "welt" was caused by the chauffeur's finger nails. Gelsky's partner had preferred to tell him that he dropped the revolver rather than it was taken away from him, it seems.

Gelsky had told me in the Reformatory that he had informed Neilsen Olcott (2nd), whom Judge O'Sullivan had assigned as counsel for him, that he had given false evidence against Schwitofsky, and that Olcott had sent the information to the other's lawyer. On mentioning this circumstance to Mr. Olcott, on whom I called at his office, he recalled the case immediately. "The first thing Gelsky said to me when I went to see him in the Tombs after being assigned to defend him," Olcott told me, "was that he had got an innocent man into grave trouble, and that he wanted to repair that injury more than to clear himself. He was so insistent in the matter that I wrote to the injured man's lawyer, William D. Bosler about it. I got an acknowledgment of the letter, but never heard from him in the matter again.

"The boy, Gelsky," Olcott continued," was a rascal, but his anxiety to clear this man, Schwitofsky, was so strong that I almost took a liking to him. His remorse in that instance seemed to me his one redeeming trait. He never saw me that he did not ask me if I couldn't do something more than I had done to prove Schwitofsky's innocence, and tho he lied and contradicted himself about almost every other point that came up in his case, he always told the same story about having given up the wrong man to the police."

The story Gelsky told to Olcott about his being coerced

into the identification of Schwitofsky's photograph by Talt is the same that he told me. Olcott's letter to Bosler, which was dated April 11th, was as follows:

"Dear Sir: I am the attorney for Leo Gelsky, who has just been sentenced to Elmira under an indictment for blackmail, on which he pleaded guilty. I understand that you are the attorney for a man in the Tombs, whose name I do not know, but who, my client tells me, has been implicated thru some statement of his. He informs me that the statement is untrue, and that he would be very glad to do anything in his power to right the matter, and is entirely willing to testify in your client's favor, should you so desire.

"You can see from the ambiguous tone of my letter that I am unfamiliar with the case of which you are in charge, but I have no doubt that this letter will be more intelligible to you than it is to me."

Mr. Bosler remembered the incident of the letter from Olcott, when I saw him the same day. The letter had been received while he was away from his office, ill in a hospital, and had been acknowledged by his secretary. He told me that he had not considered it worth while to send the information that Gelsky was prepared to testify at the Schwitofsky trial to Mr. Carpenter, when that lawyer succeeded him as counsel in the case, however. Bosler frankly confirmed Schwitofsky's statement in one of his letters to Judge O'Sullivan, that he had told his client that he would not spend time and money in looking up his witnesses. "He had an awful record, and I believe that he was more than half crazy," observed the lawyer. "I was glad when some one else was assigned to defend him while I was ill."

A VETERAN'S OPINION.

I cited Schwitofsky's case to a veteran journalist, who has the reputation of knowing more about the New York police force than most of the men connected with the department. "Kinsler and Duggan," he told me, "would consider themselves as acting quite within the sphere of duty in arresting your man whenever they came

across him. He was an ex-convict, and in their minds a professional criminal, doubtless. Detectives often make arrests of men who they know cannot 'get back' at them, even if they are not criminals, merely for the sake of adding to the number of arrests to their credit. Sometimes a plainclothes man, who may have spent the night playing poker, or even at home in bed, will arrest an inoffensive crook on his way to headquarters and trump up a charge against him, pretending that he has spent hours on the trail in order to account for his time.

"As to the arrest in Harlem being a 'frame-up,' that is quite possible. Kinsler and Duggan were out for a record, and if they could put a professional criminal behind the bars, and at the same time gain repute for themselves, they would probably consider that they were doing a public service in laying the criminal by the heels, regardless of the method of doing it. The same proposition goes with the Dale burglary, but under different conditions: Four detectives in this instance devote ten days to the apprehension of Gelsky and his partner. They get Gelsky, and he tells them that the other offender is beyond their reach. It is not to their credit that he has escaped them, and one of them at least knows of an ex-convict, whom we will say he believes to be a dangerous man, at large in the community, who has threatened to disgrace two brother detectives. Why not put up a job on the ex-convict, thus not only obtaining credit for the arrest of the Dale burglar, but getting a dangerous criminal out of the way, and likewise preventing his informing on their brethren?"

THE ARREST IN 1908.

In considering pros and cons as to whether Schwitofsky's arrest was the result of a police "frame-up," we are justified in assuming that Duggan at least was willing to

send him to prison on manufactured evidence, since that is a matter of record in the identification book at the Tombs. Further, Schwitofsky says that he saw Kinsler point him out, through the space between an open door and its frame in the Centre Street police court, and that the man to whom he was thus pointed out afterward identified him as a person he had seen in the hall of an apartment house that had been robbed.

If there was a "frame-up" in this instance, there were, besides Kinsler and Duggan, the four other central office detectives comprising with them the Harlem burglary squad, concerned in it—L'Heureux, Geary, Mott and Quick. If Schwitofsky's story is correct, he was arrested on Lenox Avenue between One Hundred and Sixteenth and One Hundred and Seventeenth Streets about midnight, while in the company of a "stool pigeon" (employed by Kinsler and Duggan) who had accompanied him to the Bowery earlier in the evening, and had been with him when he purchased the pistol, the putty knife and the pliers for use in his store, which appeared in the charges against him as concealed weapons and burglars' tools. The stolen property in his possession upon which he was indicted consisted of two inexpensive stickpins, tho a hand mirror with a white metal back, and fourteen copper coins, were found upon him that were also claimed by the owner of the other articles. The pins, the mirror and the coins, according to Schwitofsky, had been given to him by his partner, who had purchased them a few days before from a pedlar in their store in the presence of several customers. The detectives record the arrest variously as occurring at two, two-thirty, two-thirty-five, and three o'clock in the morning.

Schwitofsky maintains that the "stool pigeon" had communicated with Kinsler and Duggan after leaving him in the Bowery, and had afterward waited for him at the Spring Street entrance to the subway to accom-

pany him uptown and deliver him into the hands of his enemies, with the pistol, the putty knife and the pliers in his possession; that a mask that he was said to have secreted under his hat had been produced either by his companion or the detectives at the moment of his arrest, and that the pistol, putty knife and pliers were unwrapped from the original package afterward. If Schwitofsky's story is correct, the detectives must have had him in seclusion somewhere for a couple of hours, for, according to the police blotter, he did not reach the East One Hundred and Twenty-sixth Street station (where he says he arrived in an unconscious condition as the result of the blow from a blackjack) until after 2.35 in the morning.

I heard Duggan's version of the capture of Schwitofsky as he related it to Deputy Commissioner Dougherty in the latter's office, and I subsequently examined separately at police headquarers the five other detectives who share with him the honors of the arrest on the records of the department. Kinsler and Duggan agreed in the statements that they were alone when they arrested Schwitofsky, and that he had no companion at the time; that Duggan took the pistol from the outside right hand overcoat pocket of the prisoner, and that neither it, the pliers nor the putty knife were done up in a parcel; that neither of them struck the prisoner with a blackjack or anything else, and that the other detectives did not arrive on the scene until summoned by Kinsler's whistle.

The six detectives agree on the three main points, essential to prove that Schwitofsky was intent on a burglarious errand that night—that the arrest was at an hour when no honest man would be in the streets without some special reason; that he had a mask on his person, and carried a loaded pistol and burglars' tools—that is the putty knife and the pliers; that he was beyond One Hundred and Eighteenth Street, the thoroughfare in

which they assigned him a domicile. They also agree that he was alone.

Schwitofsky contends that it was about midnight that he was arrested; that he was on his way from the subway station at One Hundred and Sixteenth Street to his home over the delicatessen store in One Hundred and Seventeenth Street near Second Avenue; that the pistol and the so-called burglars' tools were respectively for protection and use in his store, and that they were in his overcoat pocket in the package in which they had been done up on being purchased that evening; that he was accompanied by the "stool pigeon," who he believed had notified the detectives that he would come up in the subway with their prospective victim.

If we accept the story of the detectives, we must picture Schwitofsky starting out on that March morning on burglary bent, wearing a part of the proceeds of another burglary he had committeed in the same neighborhood a few days before in the shape of the stickpins in his tie and muffler, also with a hand mirror and fourteen copper coins stolen on the same occasion in his pocket, and carrying a mask on his head in such fashion that the accidental displacement of his hat, that might have been effected in any one of a score of different ways, would proclaim him to any chance spectator as bound on a criminal errand. If the stickpins and the hand mirrors were loot from a burglary he had committed a fortnight before within a few blocks of the place where he was arrested, is it probable that Schwitofsky would go forth between two and three o'clock in the morning to commit other burglaries with these articles on his person, so that in the event of capture the previous crime might be fastened upon him?

The circumstance that Schwitofsky was wearing jewelry that had only recently been stolen from an apartment in the immediate vicinity, proves that he came by it

honestly. Men familiar with the habits of burglars inform me that these predal craftsmen do not make a practice of wearing their loot conspicuously on their outer garments in the localities looted, at least not until the hue and cry attendant upon the looting is over. Had Schwitofsky been a professional criminal and had he stolen the scarfpins, he would have known that their description was in the hands of the police and would have disposed of them as soon after they came into his possession as possible.

To my mind Schwitofsky's entire story of the events of the night of March 6th, 1908, carries evidence of truth in the very primitivenss of its construction. Assuming him to have been manufacturing a defense, his story would have been less involved, and therefore less in need of collateral confirmation if he had claimed that Kinsler and Duggan imposed the pistol, the pliers, the putty knife and the scarfpins, as well as the mask, upon him at the moment of arrest, rather than only the mask. It is as conceivable that the detectives "planted" all these articles upon him as that it was the mask alone.

Schwitofsky says that he was struck with a blackjack when he was arrested, and one of the detectives admitted it to me. Further, the records of the penitentiary show that he was transferred to the hospital department soon after being admitted to the institution, suffering from injuries to the head, probably caused by a blow. He says that he was struck because he attempted to assult his companion, the "stool pigeon." The detectives declare that there was no "stool pigeon" nor anyone else in his company when he was arrested, and that he submitted without a struggle. Had the detectives allowed the presence of the "stool pigeon" there would have been an excuse for striking the prisoner, since he admits having assaulted him. However, there would have been a compensating disadvantage in that it would have been

necessary to use the aforementioned bird's evidence in the event of trial, and he would probably not have been able to undergo cross-examination in court on the events of the previous evening. On the whole the case was a better one from the detectives' point of view with the "stool pigeon" eliminated.

LETTERS MYSTERIOUSLY MISLAID.

So much for the stories of both parties to the controversy—Schwitofsky on the one side and the detectives on the other. It is the discrepancies in the police records of the case, and the conduct of Kinsler and Duggan after the arrest that give rise to the belief that there was a crooked scheme on foot. For instance, on the 23rd of November following the arrest the then District Attorney, William Travers Jerome, wrote to the then Police Commissioner, General Theodore Bingham, asking his attention to facts reflecting upon the police management of the case, which was in the hands of Kinsler, Duggan and Geary, as follows:

"Agreeably to your conversation with Mr. Ely of my staff, I send you the following information with respect to the case of The People vs. Alfred Gerber, indicted for burglary in the 3rd degree, in which Mrs. Elma J. Ellsworth is the complaining witness. The defendant was sentenced to the Penitentiary at Blackwell's Island for six months in the Court of Special Sessions on the 7th of April, 1908, and he was transferred to the State Hospital for the Insane at Matteawan on the 15th of May, 1908. A bench warrant was sent to the Superintendent of such hospital with him to insure his return here should his condition warrant it. He was indicted for having burglarized the apartment on premises 113 West 115th street, occupied by the complaining witness, on or about the 19th day of February, 1908. The amount of property stolen was estimated at $1800, representing jewelry, clothing, underwear, etc.

"None of the property was ever recovered except two stickpins, a small silver mirror and some coins. These were found upon the person of defendant when he was arrested. The officers in the case were Kinsler, Duggan and Geary. The facts are as follows:

"On or about 13th of February 1908 the complaining witness left

her apartment and went out of town. She was gone until the 20th; between the 13th and the 20th days of February her premises were broken and entered and the property above referred to was taken. Immediately after her return she interviewed the janitor, who told three different stories as regards the time when the burglary occurred. He stated in her presence and in the presence of Mr. Reise, 1st, that the premises had been entered on Wednesday, and he told John Mendel, a brother-in-law of the complaining witness, that the premises had been broken open on Tuesday night, and he told a certain other person, a vegetable vendor, whose name the complaining witness does not remember, but who can be produced, that the premises were broken open on Monday night. According to the complaining witness the janitor, whose name is Sharley or Charley, was employed during her absence from her apartment. The complaining witness told the officers above referred to, namely Kinsler, Duggan and Geary, about the conflicting statements made by the janitor on the evening of February 20th, 1908, upon her return, and said that she thought the janitor ought to be interrogated because of them. The complaining witness also told me that Kinsler informed her that he knew this janitor and that his picture was in the Rogues' Gallery. *As a matter of fact, however, so far as the complaining witness knows, or so far as any one in this office can ascertain, the officers never did anything toward apprehending, examining or producing the said janitor, as a witness, either before the City Magistrate when Gerber was held, or at any other time;* nor did they ever produce any witness at the District Attorney's office except two persons who knew nothing about the burglary and only located the defendant as lurking about the complaining witness's premises.

"It seems to me that this matter should be investigated because of the amount of the property involved; because of the failure to report, and because of the failure to look up and apprehend the janitor of the premises."

Kinsler and Duggan, who were both able and ambitious men, working hard for promotion, had been sent to Harlem at the head of the squad comprising the four other detectives for the purpose of suppressing a burglary epidemic there. Why should they have been so lax in following the clue relating to the janitor of the apartment where the burglary in question had occurred, particularly as Kinsler knew that the fellow's photograph was in the rogues' gallery? The only complete answer to that question is that they had put into operation a scheme to "frame up" Schwitofsky as the crim-

inal, which would be thrown into confusion by the arrest of another suspect.

The letter from Jerome's office was acknowledged by Gen. Bingham, with the promise that "the matter will be carefully and promptly investigated." In ordinary circumstances the District Attorney's communication above would have been referred to Deputy Commissioner Arthur Woods, who was then at the head of the Detective Bureau, or to Deputy Commissioner Bert Hanson, who had charge of the police trials. Neither Gen. Bingham nor his private secretary at that time, Daniel E. Slattery, to both of whom I showed the letter, remembered anything about it—as is quite natural after an interval of five years. Both Mr. Woods and Mr. Hanson were positive that it had never been referred to either of them. Former Assistant District Attorney James R. Ely, who had charge of the prosecution in the Ellsworth burglary case, recalled the letter to Gen. Bingham and the fact that no investigation of Kinsler, Duggan and Geary's connection with the matter was ever reported to him. (He also recalled the fact that he had a suspicion at the time that the failure of the detectives to arrest the janitor mentioned in the letter indicated something irregular in the police conduct of the case.) The fact is that no investigation was ever made, altho on November 27th Duggan turned in a routine report of the Ellsworth burglary addressed to Mr. Woods which that gentleman does not remember ever to have seen.

A possibility is that the letter from the District Attorney, Gen. Bingham's acknowledgment of it, and Duggan's report were abstracted from the files at police headquarters and not returned until after Gen. Bingham was out of office. The effect of the removal of these documents from their places would be that, not being reminded of his proposed investigation of the conduct of Kinsler, Duggan and Geary by the return to his

desk of the District Attorney's letter with Duggan's report, Gen. Bingham never thought of the matter again, since, with so many more important matters on his mind, he would not have automatically recalled the Ellsworth case. Mr. Ely informed me that the abstraction of papers from the files at police headquarters was a common occurrence during his connection with the District Attorney's office; also that he had more than once been able to prevent police "frame-ups" of prisoners in trials where he was prosecutor.

THE 1908 IDENTIFICATION.

Two days after Schwitofsky's arrest in Harlem he was "lined up" in the corridor of the Tombs prison with half a dozen other prisoners, and Kinsler and Duggan brought in five persons, two of whom were householders whose premises had recently been robbed, to ascertain if any of them had ever seen him before. A daughter of one of these householders, a young woman, had seen the presumed burglar in the hallway of her father's house, and thought she would be able to identify him if she saw him again. On going along the line of prisoners this young woman picked out an Italian named Jovine as the man she had seen in the hallway. After a talk with Duggan, however, she declared that she had made a mistake and that Schwitofsky was the man. Deputy Warden Hanley had seen Duggan indicate Schwitofsky to her, however, and he refused to let the identification stand, although the lieutenant begged him to do so. *These facts are a matter of record in the Tombs identification book.* A man whom Kinsler and Duggan brought to the Tombs on the same occasion and who identified Schwitofsky as having been loitering about the apartment from which the stickpins and the hand mirror had been stolen on the day of the burglary, gave a false address. At least

when I looked him up there in the summer of 1911, the janitress was positive that no such person had lived there during her term of office, which covered ten years. This was the man to whom Schwitofsky says he saw Kinsler point him out through a crack in the door in the Center Street police court the day of the line up in the Tombs.

Schwitofsky asserts that when his "pedigree" was taken at the One Hundred and Twenty-sixth Street police station, his name being given as Gerber and his address as 343 East One Hundred and Eighteenth Street, he was only partially conscious as a result of the blow from the blackjack, and did not know what was written in the blotter. He declares that he never lived in One Hundred and Eighteenth Street, but at the time of his arrest he had a room over his store in East One Hundred and Seventeenth Street. Kinsler assured me in 1911 that Schwitofsky did live in One Hundred and Eighteenth Street, because he (Kinsler) visited it the day after the arrest and found some of the prisoner's clothing there. No. 343 East One Hundred and Eighteenth Street is an Italian tenement house, the janitor of which not only does not remember Schwitofsky, but is positive that no Jew ever lived there—Schwitofsky being a Jew.

In the story they gave out to the newspaper reporters on the day of Schwitofsky's arrest, Kinsler and Duggan did their utmost to blacken his character. According to the afternoon newspapers that day, the prisoner had been recognized by Kinsler as just out of Trenton prison for a $60,000 jewel robbery in Orange, New Jersey, and as having served two terms in Sing Sing for burglary. Two memorandum books were said to have been found on him, containing the addresses of more than 200 prominent New Yorkers, opposite each address being a note which gave the time of going to bed and other habits of all the members of the household. "Nearly a hundred of the addresses were marked off, and a glance showed

them to be houses on the west side that had been robbed recently," one newspaper said. The newspaper headlines were sensational. "Police Capture Alleged Head of Robber Gang—Alfred Gerber Declared to be Leader of Thieves in Terror Zone—Had List of Houses, Many of Them Among Those Recently Looted," was one of them. "Nabbed Masked Thief at Pistol Point—Detectives Get Man Said to Have Been Terrorizing Harlem—Is $20,000 Jewel Robber," was another; "Had List of Places He Planned to Loot—Pistol at His Head Made Armed and Masked Burglar Surrender," was a third, and there were others of like tenor.

One newspaper—and the reporters all got their information from Kinsler and Duggan—said that letters were found on the prisoner that led the police to believe that much loot recently stolen from west side homes had been hidden in Jersey City, and that he had a big bunch of pawn tickets representing stolen property in his possession.

The Trenton and Sing Sing prison sentences, the memorandum books with the names of householders, the letters and the pawn tickets were all pure inventions—with the exception that there were three pawn tickets for small amounts loaned on the prisoner's own property.

I have already shown that the list of articles alleged to have been found in Schwitofsky's possession varies on every police record, altho such lists are supposed to be made with the utmost accuracy, since otherwise there would be every opportunity for the loss of valuable property. There is an hour's difference in the recorded time of the arrest of Schwitofsky in official reports made by Kinsler and Duggan. In a report made to Fourth Deputy Commissioner Wood on November 27, 1908, the hour of the arrest is given as 3 A. M. In a report made by Kinsler to Commissioner Waldo on August 30, 1911, the hour of arrest is given as "about 2 A. M." Now

every detective and policeman carries what is known as an "arrest book," and is instructed always to record every detail of an arrest, and particularly the time—for obvious reasons.

Why should the time of Schwitofsky's arrest have been falsified certainly in either Kinsler's or Duggan's arrest book, if they were giving the prisoner a square deal?

Why the discrepancies in the various official records of the list of articles found on the prisoner?

Why the lies about the memorandum books, the letters and the pawn tickets?

Why the manufactured stories that Schwitofsky had served terms in Trenton and Sing Sing prisons?

Why the effort to have Schwitofsky falsely identified in the Tombs?

Why the neglect to apprehend the suspected janitor (whose photograph was in the rogues' gallery) of the looted apartment house?

THE CURRAN INVESTIGATING COMMITTEE.

Kinsler and Duggan were called before the Curran Investigating Committee last November to answer questions about the robbery of Ullian's jewelry store in Boston, for which crime Duggan had arrested Jacob Goldberg, afterward sending a lawyer to him who collected $500 and told his client that he would have to share the money with Duggan. Ullian, a reputable business man, testified before the committee that Duggan had offered for a consideration to recover some of the stolen jewelry that was believed to have been pawned in New York. Duggan was given every opportunity to deny this statement, but as he refused to waive immunity he was not allowed to go on the stand. Kinsler also refused to waive immunity, and was not permitted to testify. Ullian was told by Duggan that he was a business man as well

as a policeman, and that he had $90,000 in bank. Kinsler is reputed to be wealthy. Mrs. Ellsworth told me that one of the three detectives who investigated the burglary of her flat, either Kinsler, Duggan or Geary, suggested to her that money might secure the return of her stolen property.

Kinsler and Duggan have both been made police captains since Schwitofsky went to prison. While in the Detective Bureau they did a great deal of work with "stool pigeons." They were remembered perfectly well when I mentioned their names to Gen. Bingham, Mr. Slattery, Mr. Woods, Mr. Hanson, and Mr. Ely, but not one of these gentlemen had a kind word to say about them. Neither has Dan E. Kimball, of the Prison Association, who is the dean of the benevolent workers in the criminal courts, and who has been familiar with their police work ever since they have been in the Detective Bureau.

FRANK MARSHALL WHITE.

The People's Story.

EVIDENCE AT THE TRIAL.

(Told in narrative form. Asterisks mark 'exceptions' by counsel.)

NETTIE PALMA, of 304 E. 11th St., testified:

That on 19th January of this year (1911) she was living at 71 W. 45th St., owned by Mr. Dale and conducted as a dress-making place. It was a private house and Mr. Dale occupied three rooms on the second floor (that is, you go up a few steps from the street to the first floor and then you go up another flight) for the dress-making. There were two others employed by Mr. Dale. At about 8.30 in the morning of 19th January (it was a bright day) she saw the defendant (whom she indicates). There were then three people in Mr. Dale's place—ANNA HART, NORA MURPHY and herself. The bell rang, witness opened the door, defendant said, "The telephone man." Witness showed him where the telephone was and went upstairs. Mr. Dale occupied the whole building, using the second floor for the dressmaking. The telephone was on the parlor floor, in the middle of the three rooms there. Witness took the defendant into the second room where the telephone was, going through the hall into the room, and left him there, she going upstairs to her work.

The next time she saw defendant was about ten minutes after when Mr. Dale called to them and she went down. Mr. Dale wouldn't let defendant out.* (Objection to last statement sustained.) Mr. Dale called the

maid, Anna Hart, and told her to stand by the door and not let defendant out. And when he saw that Mr. Dale wouldn't let him out he took out a revolver and said to Mr. Dale, "Are you going to let me out?" And he said, "No." He said, "I'll shoot you if you don't." And then he turned to Anna Hart, and said to her, "Are you going to let me out," and she said, "No," and then he said, "I'll shoot you" to her. And then she opened the door and let him out. And Anna Hart and Mr. Dale ran after him, but couldn't catch him.

She saw them running after him towards Fifth Avenue, and then run back to Sixth Ave. She saw him doing that. He ran about five houses towards Fifth Ave. on the opposite side of the street. Mr. Dale and the girl were about four feet behind him. *Mr. Dale was hollering and nobody would catch him, so he turned to cross and he dropped his revolver and he ran towards Sixth Ave. and jumped on a car.* And there was another fellow with him.

The next time she saw the defendant was in 57th St. in the Court.

Cross-Examination.

Defendant dropped the revolver. Mr. Dale did not pick it up. The detective picked it up. The detective has it. She saw defendant drop the revolver. (Witness repeated her testimony before given as to opening the door at 8:30 A. M. to defendant.) She didn't probably talk to him more than a second or two and then he went with her to the telephone booth. It wasn't a dark entry —not dark there at all. It's very light.

A cross-examination ensued as to the darkness of the hall (witness insisting on its being light) and also as to her having testified before the magistrate that the offense occurred on the 20th of January—and not on the 19th.

Defendant did not point the revolver at her. He

pointed it at Dale who didn't bother about the revolver being pointed at him and didn't let defendant out. It was only when he pointed the revolver at Anna Hart that she let him out.

In the course of cross-examination as to how she identified defendant the Court asked:

"Have you any doubt in your own mind at all that this is the man "

Witness answered: "Yes, sir, that's the man."

"Have you any doubt about it?"

"No."

"You have no uncertainty about it?"

"I am sure that's the man."

In answer to counsel for The People, witness testified that she identified the defendant now, and did not do so because Mr. Dale says it is the man.

Re-Cross-Examination.

Witness has been talking with Mr. Dale and the policemen and has been coming to this court and the police court and has been talking frequently about defendant. "But you must remember," she said, "that this man was caught two weeks after! No, it was not hard to identify a man caught two weeks afterwards."

Theodore B. Dale, of 71 W. 45th St., testified: That he is a dressmaker whose place of business is at 71 W. 45th St. He was in that business in that place on 19th January, 1911. He occupies the entire house. At about 8.30 or 8.40 on 19th January he saw defendant there. Defendant was not employed by him. He had not seen him before. (*"One moment, Mr. McCormick, I did see him before, outside of the house, on the day previous, but not in the house, in company of another man. He*

was speaking to a man who had been at the house to apply for alms.") On the 19th witness first saw defendant in the hall leading to the telephone closet. Witness had been in the dining-room—an extension back of the telephone closet—and came out to go to the hall to get his coat. He saw the door of the closet which contains the 'phone open, and the man on the sill of the hall-door leading to this room that had the 'phone there, with a piece of wire in his hand. He did not see defendant in the booth, but when defendant saw witness defendant went into the booth. He had a piece of wire in his hand and a pair of pliers. The cook came up and asked what the man was doing there and witness said he presumed he was there to fix the telephone. Witness walked out to get his overcoat, put it on and walked to the stoop. In the meantime he had seen the man's bag upon the piano and did not like the looks of it on his piano-cover and removed it and put it on the piano stool and answered the cook's question and walked out and put on his coat and saw the man that had been there on the previous day asking for alms, recognized him, connected the two men at once and went back, rang the bell for NETTIE PALMA and asked her what the man was doing there. He did so in defendant's hearing. He asked her because she answers the front door bell. Had let himself in with his own key. She said defendant was the telephone man. In presence of his two girls and the cook asked defendant what he was doing there. With a decidedly foreign accent he said he was from the N. Y. Telephone Co. Witness asked for his badge and defendant said, "Here's my book of instructions," and witness said, "That won't do. I want to see a badge." There was no badge forthcoming. He said he had forgotten it. Witness asked NORA MURPHY to telephone to the general manager's office and ask him if anybody had been instructed to fix the telephone, and the answer came "No," over the wire.

Witness asked the cook to guard the door while he went for a policeman. Before he could get out and put his coat on again the man came to the door and said the telephone didn't need fixing anyway and he started to leave and the cook told him that he couldn't go; that she had been instructed not to let him out. This was in witness' presence. The colored woman was Anna Hart and she said defendant couldn't leave, and he said, "You won't let me out, you won't," and he drew a revolver, and said, "I'll shoot you if you don't let me out." Then she threw up both hands, and he opened the door. Before he opened it he held the door and witness stood in the corner of the door. Defendant held the door with one hand and levelled it at witness and said, "You won't let me out; you won't? Well, I'll shoot you."

Then defendant threw the door open and ran out with the book in his hand. Witness, hatless, followed him, and he evaded a chauffeur in the street who tried to stop him and ran on the south side of the street and, in front of the Hotel Webster two chauffeurs caught defendant. Witness told them defendant had a revolver and they disarmed him. The pistol remained in the possession of one FRANK HAROLD, the starter. (Witness couldn't say whether Harold was in court; believed he had been subpoenaed.) Witness asked the chauffeur to hold defendant while he got an officer and defendant said, "Hold that man, hold that man, he was trying to kill me." Some citizen laid his hand on witness' shoulder, saying, "You had better remain here, too." Witness said, "I am perfectly willing." Then defendant said, "Hold him, hold him, he's a ———. He was trying to take me to his room to ——— me." And then they said to defendant, "You had better run along, kid. We can't get a policeman."

Witness followed defendant to Sixth Avenue where he went on a north bound car. One of witness' neigh-

bors, in fact, tried to stop defendant. Defendant was then joined by the other man—the one who had been outside at the front door—and went on northward on the car. Witness saw both of the men later when they were under arrest in the police court. One had since been convicted, not in this same case, but in a case of blackmail.* That is all witness knew about this case.

By the Court:

"Did you see the revolver?"

"Yes, sir."

"How near were you to him at the time?"

"The width of the door, about three feet."

"Do you know whether or not it was loaded at the time?"

"I saw cartridges in it."

"When?"

"At the time he pointed it at me."

Cross-Examination.

One chauffeur held defendant and the other took the pistol from him. He did not throw it away. It was taken from him. Witness was positively sure of that.

On the night of January 31st about midnight or thereabouts two officers brought defendant to him. One remained outside. Witness did not say to the officers: "I want to see the top of this man's wrist." Said nothing at any time about defendant's wrist and did not examine it. It was unnecessary. Defendant was dressed in the same manner as on the 19th. He had, however, begun raising a small mustache. Witness got out of bed and admitted the officers. The gas was lit in the parlor and the officer brought defendant in. Witness immediately saw it was the man. Witness had not noticed any marks. Defendant's accent—his language—

was enough. Defendant had the sort of face one couldn't forget. Witness asked him to remove his hat.

(Cross-examined closely like previous witness as to his having stated in the magistrate's court that the offense occurred on 20th Jan., and not on 19th, witness could not be positive as to which date he stated there but was now sure that the date was the 19th.)

The revolver was taken out of the man's pocket by one chauffeur while the other held him. Witness had already said why they didn't hold (i. e., detain) him. There wasn't an officer in sight. Witness had told them of the crime. The chauffeurs could be sent for. They were honest, decent-looking citizens and, though being told of the crime, they had let defendant go. Witness protested. He asked others to hold defendant, and tried to hold him himself. Defendant struggled and got away. The chauffeurs let him go and they didn't hold (detain) witness.

Anna Hart, of 227 W. 62nd St., testified:

That on 19th January she was working for Mr. Dale, doing general housework. About half-past eight in the morning saw the defendant, the man right there (indicating defendant) at the telephone closet in the middle parlor when she went from serving breakfast. He had the revolver in his hand when he came to the front door. He pulled it out of his pocket and drew it in her face twice and said with a very loud voice—it seemed he was very angry—that he would shoot her if she didn't move away from the door. As she moved away from the door he ran out of the door.

Cross-Examination.

It was more than two minutes she saw him in the front hall at the front door. He was standing in the mid-

dle parlor at the telephone closet in the back of the hall, like, as you come into the house. No, it wasn't very dark there and witness looked right into his face because she asked who was he. He was about three foot away from her. He didn't say anything else at the door because she didn't give him a chance when he had pointed the revolver in her face, twice. She was not the only one he pointed it at. He pointed it at Mr. Dale, too. That was after he pointed it at her. Then he ran out of the door and down the street. Mr. Dale followed him and she followed after Mr. Dale as he was calling for the police. She didn't see the chauffeurs right then. She saw them in the big crowd standing round this fellow. She wasn't close to him then but he was in the midst of that crowd. She wasn't right up with the crowd, but he was in the midst of that crowd, arguing. When she saw the man that was in the house she noticed no particular marks on him only that he didn't have the moustache which he's got on now. *"I knows him anyhow; I knows that's the man that pointed the gun in my face. I knows that!"* she said.

Nora Murphy, of 262 W. 123rd St., testified:

That she was employed by Mr. Dale's dressmaking establishment on the 19th of January and saw that man right here (indicating defendant). He was in the telephone booth when she was called down stairs, but she did not know what he was doing. He was standing just there. Mr. Dale had called her down and asked her to telephone to the Telephone Co. and see if they had sent a man to fix the 'phone. That was in the presence of the defendant. She stepped in and 'phoned to the Telephone Co. and asked if they had sent a man, and they said no, they hadn't.* After she left the telephone booth she didn't see anything more. Everybody had left the house,

except Nettie Palma, and she was standing in the hall. That was all she knew about it. But he (defendant) had 'phoned the day before and asked if this was Mr. Dale's house and said they were going to put a telephone in the house next door and they would have to cut off Mr. Dale's service for an hour in the morning and she told that to Mr. Dale who said, "All right, but not to cut off too long because it was his busy time." That was all she knew about it. She believed it was the defendant because he spoke in broken English.

(Counsel for defendant had persistently objected to all this and moved that it be struck out.)

By the Court:

"And in addition to the broken English you say that you recognized the sound of his voice?"

"Yes, sir."

Motion denied.

(Counsel) "Exception."

She recognized him now as the man who was there that day on the 19th. There was no doubt at all in her mind.

(An attempt by counsel for The People to examine further as to the voice she had heard over the telephone, met with vigorous objection by counsel for defendant. The Court: "Yes, you may have an exception. However, you may strike out the testimony as to the conversation on the telephone and the jury are instructed to disregard it." Counsel for defendant then moved that a mistrial be declared, contending that the testimony could not be stricken from the memory of the jury. Denied, apparently, as the trial proceeded.)

William W. Dugan, of the 164th Precinct, testified:

That, on 11th July, 1910, he was present in Court before Judge Swann when the defendant was arraigned

and remanded to the Tombs for possibly two weeks. About the 10th or 12th of August sentence was suspended on him. He was present and heard the Judge suspend sentence. There had been no trial for defendant had pleaded guilty to burglary in the third degree.

(There was strenuous opposition by Counsel for defendant who, at one time when Counsel for the People asked witness, "*Well officer, why did you arrest this man?*" and received for reply: "*I arrested this man because I knew him to be a professional burglar,*" moved that a juror be withdrawn and a mistrial declared. The Court struck out the answer and instructed the jury to disregard it, but denied the motion.)

EDWIN DENAHM, of 66 Fenimore St., Brooklyn, testified:

That he was a clerk in the N. Y. Telephone Co., who had charge of the employees' records and pay-rolls. His territory covered all New York County, Long Island, and part of New Jersey and it covered every employee in N. Y. County. The name Alfred Schwitofsky did not appear on the roll. He had gone back as far as 1880.

WILLIAM BROWN, of the Detective Bureau, testified:

That he arrested defendant in the Mills Hotel No. 2, in Rivington St., on 1st Feb. Before that he had visited the premises 71 W. 45th St. and had seen Mr. Dale. That was on the 19th. He received some information from Mr. Dale in reference to a man named GELSKY. In consequence of that information he went to the Mills Hotel No. 3 and made inquiry there. Afterwards he sent for defendant and asked him if he had witnessed an accident at the corner of 17th St. and Union Square. He said yes. Witness then asked him if he had saw a man named Mr. Schultz in reference to the accident and he said yes. Witness then told defendant that he was going to arrest him on suspicion of having burglarized

the house of Mr. Dale on the 19th of January. He said, "That's a mistake. I'll accompany you to the complainant and if the complainant identifies me, all right. I'll sue him." Witness said, "Are you willing to go with me to the complainant?" And defendant said, "Yes," he says, "I just went to work to-day." Witness then took him to the house of Mr. Dale and sent one of the men up and he rang the bell. Mr. Dale came to the front stoop and witness asked him to look at the man to see whether he was the man who had been in his house on the 19th of January. Mr. Dale asked him to bring defendant into the parlor so that he could get a good look at him. Witness brought him up the front stoop into the hallway and brought him into the parlor. Mr. Dale turned on the light and he positively identified the man then. He said in the presence of the defendant "That's the man." The next morning in the Police Court, before Magistrate O'Connor, he was placed on one of the benches and the three female witnesses, who preceded witness here, positively identified him. Well, he was sat in the audience and the witnesses went over there and placed their hand on his shoulder, and they said: "That's the man."

Cross-Examination.

Defendant was placed in the audience where the public sit, about fifteen feet from the railing of the Magistrate's Court. He was brought from the prison and placed in the audience. The witnesses who afterwards identified him were at that time in the inner room, the complaint room. He had to pass the door of that room—about fifty feet away, hid by a wall and another door. They couldn't see over there, you can't see anybody in the audience when the door in that partition is closed. Each of the witnesses went up the aisle in the audience, and looked over the audience, and picked him out.

The People Rest.

WILLIAM BROWN, recalled by Counsel for defense, testified:

That he arrested defendant on the charge of burglary —not unlawful entry. Did not tell him it was unlawful entry. The complaint was drawn up as unlawful entry; but witness is not responsible for the mistake of the Court. He had it changed to burglary in the second degree.

(Further cross-examination as to the manner of Dale's identification of Schwitofsky at the time of the arrest concluded thus:

"Do you recollect about him examining his wrist?"

"Yes."

"Now tell what Mr. Dale did about his examining his wrist."

"Mr. Dale never examined his wrist."

"Well, who did?"

"Mr. Harold, the chauffeur. He was the second man that identified him."

"Well, what did he say about his wrist?"

"Why, I brought him up the street——"

The Court: "Now, this is not proper cross-examination."

Counsel: "No, sir. I appreciate that, your Honor. That is all.")

The People Rest.

THE DEFENSE.

ALFRED SCHWITOFSKY, the defendant, testified:

My name is Alfred Schwitofsky. I was born in Allentown, Pa., on 4th of July, 1879. I have lived here in N. Y. since I came here in the latter part of 1900. I have lived here since 10th of August last. I have been

away since 1903, from N. Y. I have been way for 3 years and eight months. I live now at the Mills Hotel No. 2. I have heard Mr. Dale, the complaining witness in this case, testify that on the 19th of January this year, I entered his house at 71 W. 45th St.; that I went to the telephone booth; and afterwards threatened to shoot him if he wouldn't let me out; and threatened to shoot a young girl in there if she wouldn't let me out; that I ran away down the street and had a revolver and eventually escaped—that is not so. I was never in Mr. Dale's house before my arrest. I never knew Mr. Dale before my arrest. I did not know where his house was before my arrest. I was not in his house at all on January 19th, 1911, or on any other day. I did not fix a telephone for anybody, anywhere, on that day. I never was an employee of that company. The first I knew about this was on the night from the first to the second of February when I was in the Mills Hotel, out of bed and taken downstairs by an officer by the name of Dungate—I believe that is his name—not the officer who was on the stand just now. I was taken downstairs and into an office like in the hotel, where the officer which was on the stand, Mr. Brown, was sitting in a chair, and he asked me questions as to being a witness in 17th St., which I told him I was.

Then he asked me to come along, and I says, "What do you mean? I have to go to work at six o'clock; what do you want to do with me?" and he says, "Well, come along."

So he says, "Wasn't you in a party named Dale's house? Come on, we have got a couple of chauffeurs. We have telephoned to two chauffeurs ahead of time, and the chauffeurs come down here." And he said, "Come along," and I said, "Well, I'll come, because if I don't go with you, you'll take me anyway."

And we took the subway station at Spring or Bleecker

St., I don't remember which, and got off at Times Square, and turned round the corner at 45th St. And they took me to a booth like and there was two chauffeurs there outside of the booth. And Brown said, "There is the man I was telephoning to you about." They looked me over, made me take off my hat. One chauffeur says, "Show me your left wrist," which I did show it to him.

And he looked at the officer, and he said, "Well, I guess that's the man." And the other fellow looked closer yet, and he said, "I ain't sure, I ain't quite sure."

And from there they took me across the street. Officer Brown held me downstairs while the other officer, Dungate, went upstairs, and about five or six minutes after, he came out of the door and he hollered, "All right." And so Brown says, "Come on upstairs," and I says, "What does that all mean? Come upstairs? What do you take me into a house for?" He said, "Never mind, come on up," and he grabbed me and took me upstairs, and there I was confronted with a small man, who I later found out was Dale.

He looked me over and also wanted me to show him my left wrist, and I showed it to him. And he looks at the officers and Brown nodded, and he says, "That's the man"—afterwards, after Brown nodded to him.

And from there I was taken to Police Headquarters, and first charged with unlawful entry, and the clerk at the desk, the lieutenant at the desk, said, "You have to take him to the Night Court," and he said, "No, put him down as a suspicious person." I don't know which I was blottered through the two of them. And the next morning I was lined up before all the Central Office men and from there taken to 57th St. Court before Magistrate O'Connor.

I was taken to 57th St. Court and placed in the pen. In a short while, a young fellow came down stairs, and was brought down by the same two officers, and one of

them shoved at him at the side with his hand like that, and he said, "Go ahead. Say it" to the other fellow, and the other fellow started in to cry, and said, "Yes."

And from there I was taken upstairs into the back room and charged before the clerk, the clerk of the court, in the back room, on a charge of unlawful entry. Those three women—two white women and a colored woman—were sitting right there and the clerk in the back room asked me if I pleaded guilty or not guilty, and I pleaded not guilty. And I had to sign my name there, and I was taken into the corridor to wait to be arraigned before Magistrate O'Connor.

I was then arraigned before Magistrate O'Connor and an attorney was to be appointed for me by a friend to appear for me in the Magistrate's Court, but he wasn't there. So, therefore, I asked for 24 hours' stay for the attorney to be there. I heard the officer testify that I was placed in the audience. That's a lie. I heard him testify that I was placed out in the audience and the three women were called in and went up near me in the audience and pointed me out. That isn't so. Nothing like that happened. I was never placed in the audience, was never pointed out, never saw a hand put on me by any of the women.

Cross-Examination.

I am an electrician. I studied electricity over in the old country in Vienna. I have held jobs as an electrician. My last job was for the Interborough Railway Co. I worked for about 4 days until I was arrested—3 days in 98th St., and one day in 129th St. Before that I worked for myself. I had a shop in 19 and 21 Second Ave. I had that shop for about 2 months from the beginning of October till the latter part of September—November. It was a basement. Occasionally I employed men. One time I had two men employed at general electrical work.

(Under questioning defendant gave particulars of the jobs he undertook in this shop.)

Before that I worked for Mr. Ike Silverman of the Fidelity Secret Service, at 123 Liberty St. I worked for him in the latter part of August and all of September. My work was inside work in the office—writing and reporting matters that come in—reports that were brought in by the men. No, not detectives, by the men that acted as guards in the cloak and suit strike.

Before that I worked for a general contract—Mr. Louis Berlion. Before June, 1910, I was in Matteawan State Hospital.

I was not really convicted in 1910 of a burglary committed in 1908. I pleaded guilty under the circumstances of being away two years and a half in Matteawan State Hospital. I wasn't tried in 1908. I was charged at the same time with carrying burglars' instruments. If you take it that way I was carrying that the day after I got out even from Matteawan. I don't think I had burglars' instruments with me. *Yes, I did plead. I plead guilty under the circumstances. I pleaded guilty in the Court of Special Sessions in March,* 1908, *to a charge of carrying concealed weapons. I was guilty of that. It was a revolver.* I was two weeks on Blackwell's Island and then was transferred to Matteawan, where I remained 2 years and 4 months. I came back to the Tombs where I was from the 6th of June to the middle of August. I got a job the day after I came out. I was arrested on the night between the 1st and 2nd of February. So that I was out of jail from August until February. I served a term for grand larceny in Pennsylvania, for stealing something like $25,000. That was at Morristown. I pleaded guilty, was sentenced to 5 years—three years and $1,000 fine. That was on the 8th December, 1903. Yes, I have been in jail most of the time for the last ten years.

As far as I can recollect I was at 123 Liberty St. on the morning of the 19th of January.

I was once fined $5 in Hoboken, N. J., on May 14th, 1903, on a charge of grand larceny before Judge Blair. I went to trial and was fined $5.

I have not committed any crime since I got out of jail. I have not committed a burglary since. I have never carried a gun since I was out. All these three or four or five people who say they saw me with a gun and saw me point it must be mistaken.

At 8.30 in the morning of the 19th I was downstairs at 123 Liberty St. waiting for Mr. Silverman and then I went to the Lion Brewery where I was a witness.

Re-direct Examination.

(Counsel and defendant both pleaded for permission to enter into a detailed statement of former crimes so that, in the words of defendant, "I have a chance to show that perhaps I was not guilty, because I plead guilty, but I wasn't given justice by that Court." Objected to and, after argument, objection sustained.)

I was in Matteawan—an insane Asylum—for 2 years and 4 months. I got out of there on June 6th, 1910.

I should like to show his Honor and the jury that I am really framed up on this charge—I would like to show this to the jury. No, sir, I have not been framed up on all my sentences. I admitted them. I plead guilty. I was not in the employ of the Telephone Co. on the date named in this indictment. I don't think I was carrying electrician's tools and wires on that day—not that day—because I wasn't working that day.

(In answer to the question, by the Court, "Well, what were you doing on that day?" Witness did not answer.)

Yes, I often carry electrician's tools around, whenever I work. I was up until December carrying them around.

I ask his Honor to let me explain my matters; how

people have framed me up—in 1908—the former conviction is put against me, and I should have a chance to explain those former convictions. I were convicted, but I were not convicted right. I plead guilty to a charge which I wasn't guilty of, but on the grounds of being away two and one-half years and I didn't have any witnesses at that time; I couldn't get my witnesses after 2½ years, but at *the same time I was indicted in March, and went up to plead, and pleaded not guilty, and I was tried and I was sentenced on the misdemeanor and sent to Blackwell's Island.*

And while I am in the Tombs, I have perhaps committed a foolish deed on that account that I was framed up, and they changed the records and the identification book of the Tombs will show it also, that Officer Dugan came there on one identification—(Defendant not allowed to proceed).

I pleaded guilty of burglary in the third degree—a felony—on the ground I had no witnesses and I was promised a suspended sentence by the District Attorney —Yes, I plead guilty. Why no, I wasn't imprisoned for that. I was kept there in Matteawan. Yes, sir, I was sent from prison to Matteawan, an asylum for the insane.

(Defendant being instructed not to go into any detail of former convictions or the reasons therefore, but being permitted to make any explanation about the present case that his counsel considered advisable, proceeded.)

Where should I start in? At police headquarters I was charged with unlawful entry—(stopped by the Court). When I was taken before the chauffeurs for identification, they wanted to see my left wrist and they saw my left wrist, and then they looked at the officer and one of them said, "I guess that's the man." And the other one hesitated and the officer nodded to him, and he said, "Well, yes, that's the man." They didn't examine my face and I have marks on my face and neck. And these were the

chauffeurs that were supposed to have held the man that did run away.

I wasn't identified in the 57th St. Court. I was taken inside of the rooms in the back, and the charge was put against me, the clerk wrote the charge down and asked me if I pleaded guilty or not guilty, and I pleaded not guilty, and I signed my name to the paper there.

Re-Cross Examination.

No, sir, I did not have the stuff—a large number of articles of personal property—on me that the police officers swore that they found on me, in that prior conviction when I was charged with having burglarized the house of Alma J. Ellsworth.

I plead guilty because it was two years and six months maybe after this was committed. The complainant could be gotten any time, but my witnesses couldn't be gotten, as the State wouldn't get my witnesses on my expense. And I didn't had the expenses to get the witnesses and I was told if I pleaded guilty I will be—sentence will be suspended. That's why I pleaded guilty. I was laying two months and a half in the Tombs already then.

These two police officers did find 2 pins on me. When I said a few minutes ago that they didn't—they said a "large amount of stuff." Them two pins didn't belong to me. They were bought in a store. This woman, when she identified her property was mistaken. She didn't identify me. And that's the reason I should like to get the identification Book from the Tombs.

And these two young women and Mr. Dale who have identified me here are also mistaken.

I pleaded guilty in August after two months and a half nearly, and that was after *serving a term in Matteawan.* No, the reason why the chauffeur wanted to look at my HAND WAS NOT THAT, AT THE TIME HE STOPPED ME THAT MY

WRIST WAS CUT BY HIS NAIL. He wanted to look at my wrist and examined my wrist, then he shook his head.

I wish to state a few more points in this case: When I came out from Matteawan, I was working for Mr. Berlion and I was stopped several times by police officers, and later on, I was working there a week and a half, and I was told by my boss, Mr. Berlion, that I am discharged, and I asked him, "On what grounds?" and he said, "I can't afford it to bother with the police."

And so this is the reason I started to work for Mr. Silverman. After I quit Mr. Silverman, when the work was over, I started in for myself, and I took contracts which I could show from records of the Board of Fire Underwriters and the City Building Department, where I put up electric signs for the Chatham Club, at 6 and 8 Doyer St., and this I lost by the way. I came out from Matteawan without a cent, and I didn't have a cent or a pair of shoes on my feet, and I worked myself up and tried to do right, and I was interfered with by the police from the time I was out of there.

(Stopped, on objection.)

(The Foreman of the Jury having received permission from the Court inspects defendant's wrists. In answer to his question, defendant states)—

"That scar on my wrist I done myself in 1908."

(Following dialogue then took place between Eleventh Juror and defendant):

"Do you know the chauffeur?"

"No, I don't."

"Well, how does he come to ask you what you have on your left wrist?"

"I don't know what he asks me for."

"Well, then, he must have caught you at the time you were there?"

"I don't know."

"Otherwise he wouldn't know you have a wrist like that?"

"I don't know. He asked me to show my left wrist."

"Well, why?"

"I couldn't tell you."

(At the request of Counsel for the People all the Jurors were shown defendant's wrist.)

The Prisoner's Story.

Told in a letter to Mr. Dan E. Kimball, Probation Officer.

On the anniversary of the birth of civil liberty in America, I, who have suffered through unjust deprivation of it perhaps more than but few other men, was boren in Allentown, Pa, July 4th 1877. My parents had emigrated from Austria and when I was two years old they returned to Europe. there I was given a good education and became an electrician and a candidate for license as an electrical engineer. At the age of twenty two I began a set of educational journeys, traversing Europe, sailing from Antwerp for Rio de Janeiro, thence by the steamer Stutgarth for Yokohama thence to Sidney, Australia and via San Francisco to New York. living here on an allowance of 125 Gulden, about $50, pro month from home. In 1899 I returned to my home in Schmigrot, Galicia to recive an inheritance of 64000 Gulden from my Grandfather. Returning in April 1900 I banked $25400 in the Federal State Bank later investing in 100 Shares of Creston Copper Co. Stock at $20 a Share on the advice of the president Mr. D. Rothschild and finding the investment profitable, still another 150 Shares. By November I had less than $3000 in the bank having been informed by my broker H. A. Schlossal that if I cant send more margin I.ll be wiped out.
thinking to recoop in business I formed a partnership in 1901 with S. Cohn and we went into the Restaurant business at 312 Broome Street. By Juli of that year I had lost everything and was compelled to send home

for money recieving $600 from this I used part of it to take my jewelry out of Pawn. I had in the meantime secured a good position in the spliceing department with the New York Edison Co. the work was out of doors and as soon as bad weather started I fell sick. When convalescent my doctor advised me to go too a warm climate so I secured work as an electrician on the Steamship Curetiba running to Cuba and eventualy regained my health. going to Hobochen after several voyages I had my first experience of American police methods I was sitting in Jack's Cafe with a young lady when a man began to offer some nice articals of ladies linen for sale he was persistent seeing that the young women with me fancied the articals so I bought them for $8. Later we went to Gransberg's Concert Hall where we were when two detectives entered and place me under arrest for the theft of the articles. I was charged with larceny, put up cash bail, was compelled to wait trial and lose my position or lose my bail and when tried, though I had teen witnesses to prove my purchase of the articles I was fined $5, not an important thing save that it placed me on the records as a criminal offender when I was absolutely innocent.

Going to Cuba again I completed a contract equipping the home of Sr. don Almando of Newvitas with an electric plant and returned to New York to find that the boyhood sweetheart I had left in Tarnow, Galicia wished to join me and become my wife and that my family had send me $3000 for this purpose. She was the sweetest of girls and looked so pretty and innocrent as she leaned over the rail of the Barbarossa among Feb. 9th, 1903, that as the picture rises befor me and I think of the quick tragedy that fell upon us, it seems more than I can bear.

We were married, took a wedding journey to San Francisco and returning prepared a home. I bought a cigar store in Second Avenue and try as I would I could not

succeed and in desperation tried to play the races and recoop. Soon the furniture of my home was mortgaged and the cigar Store sold for much less than its value to pay my debts. Among those to whom I was in debt was a group of men of whose pursuits I was by no means certain. two of them called one day at my home in my absence and told my wife to have me come to see the third a man named D. at 75 Second Ave. the two were Eddy N. and Paul H.

I went to D. place and met the three D. took me to one side and told me he was going to offer me a chance to pay up my debts and get on my feet.

The plan was that I was to take a position which N. could not fill and there would be a large quantity of jewelry in my care or at least where I could get it. When the proper opportunity came I was to give this to N. or H. stay on in my position or return with them to New York as I chose. If I did not go in with them they would close down on me at once. I was in desperate straits and my wife was soon to become a mother. at least I could take the position and then temporize so I pretended to accept. they provided me with all sorts of references with an asumed name and by way of a Philadelphia Employment agency I was soon in the Employment of a wealthy Mr. Harrison of Glenside, Pa., near Philadelphia.

During this period N. and H. dogged the House coming disguised as peddlers, umbrella menders anything that would give them a chance to get near the house or get in touch with me. Worry, distress, separation from my little wife were telling on me. I was taken sick and was treated in the house by a doctor Kaiser of Germantown. shortly befor thanksgiving day I was up and around again and N. reappeared. I did not know what to do. to tell Mr. Harrison would mean my dicharge.

Thanksgiven day I was given to understand that on the

ground not beeing quite well I was no longer wanted. I was told by Mrs. Harrison to pay the bills incurred by my sicknes out of my own pocket. I went to my room looking out of the window I seen N. hanging about and I made up my mind to yield to temptation. At once I committed my first and only crime—this I say despite all that I have suffered. I took jewelry worth $25000 and joined N. and further down the road H. All three returned to New York and the package was placed in a safe at 32 Second Avenue. my poor wife was overjoyed to have me back but guessed there was something wrong. then I told her and crying "Oh, Alfred, what have you done."

She fainted.

She planned then and there for me to secure the jewelry and that she would take it back to Mrs. Harrison. She went alone to secure the package but the holder would not give it up so I went and receipted for it. we were afraid to go home dreading the revenge of N., H. D. so we went to the home of a supposedly good friend up town and told him the whole story. he asked us to stay there till everything was settled. two years before I had been his benefactor in many way's and went security for the verry house that now sheltered him.

Nevertheless to secure the reward of $500 he hastened to betray us befor my little wife could arange to bring the jewelry back. I was arrested in his home taken to police headquarters on what I had told him N. and H. allso were arrested and brought to police headquarters. While there at a late houer N.'s girl came to see me and told me that since I was in for it, if I would keep quiet they would get me out of trouble. When arraigned in Tombs Police court preparatory to extradition to Pennsylvania N. and H. had able councel and in some way their discharge was continued and they disappeared. I apealed to those I had aided when I had plenty but none responded. there

was but one faithful being—my sick, half frantic, pennyless little wife. She came to me dayly helping all she could while waiting to be extradicted.
When taken to Norristown Pa jail, I borrowed from an officer the stamp to send her the following letter knowing that she had no funds to come to Norristown and that I was doomed and was only a load about her young neck.

Dec. the second 1903.

Dear Sophie

By the time you receive this I will be behind bars in the Norristown jail. It will be no use for you to try to speak to Mrs. or Mr. Harrison. In the first place they will not admit you and in the second they are heartless people. Now Sophie dear, it will be a long time befor I can be with you again so forget me but forgive me for the disgrace I have brought upon you I am not worthy to be called your husband any longer. you are young and do not let me stand in the way of your life's happiness. Should our chield be born and live you may have to put it in an institution but for your own sake dear drop me. Let me know where you put the chield. I will agree to anything that you undertake for your future.

Your unfortunate

Alfred.

On the 8th of Dec. I was taken into court and gave a plea of guilty. I was pennyless, undefended, unadvised and I was sentenced immediately. two charges were made out of the one and my criminal record from Hobochen told of by the constabler who made the transfear from New York to the Norristown jail. I was given the maximum on both a totel of five year's and $1000 fined. The same day I was hurried to the Eastern Penitentiary and two days later this letter came to me:

December the 7th, 1903.

Dear and loving Alfred

I received your letter and I must tell you that I have no intention of doing as you wish me to do. Do you remember the day under the chipper (used in a hebrew marriage Cerremony) where we promised each other that nothing but death should part us. I shall keep that promise. Mr. Moskowitz was here and took the piano and furniture for the money he lent you on them. When he asked for you I had to tell him of your trouble he felt verry sorry for you. and gave me $50 to get a lawyer. So, dear, cheer up. Trust in the one above as I do. I will sell what there is left, and put the trunks in storage. Let me know when your are going to be tried so that I could get there and have a lawyer to defend you. the three responsible for your troble have left the city. Dear, don't write me any more letters like the one you did. I will see you Tuesday.

From your loving wife

Sophie

My reply told her of the way in which I had been railroaded. She left New York immediately, went to Mr. Harrison's office and was refused admission. a competent attorney was retained, called on me and got the fact's. He said I was entitled to an appeal from my sentence as there was but one charge of larceny instead of two. It would cost $500 to effect it however.

It was bitter winter weather nearing Christmas. my little wife went here and there trying to raise the money but she took sick from exposure and was compelled to accept the invitation of a cousin in Cincinnati to come there as the period of her confinement was drawing near. I shall never forget that parting one January day. In a few days she gave birth to a boy but one day the Chap-

lain came to my cell—it was after week's of silence, agony, suspense—my Sophie had died the day after the child was born. unable to raise the amount for an apeal in my case I gave up hope to gain liberty befor my sentence expired It was the 8th of June 1907 when I walked forth in the light of day once more. In a few day's I was able to make my way to Cincinnati and for the first time saw my own child's face in my cousin's home. After a short stay I returned to New York with the boy and gave him in board with a Mrs. Sneider a friend of my deceased wife from the old country. I obtained a position as Electrician in Gloversville which lasted three months, but I saved my wages and made conciderable in overtime. returning to New York I sold all the rest of inlaid work which I made while in the E. S. P. It was only a few day's that I had been in New York when I was arrested in an Eighth Street restaurant by Detective's Kinsly and Dugan and charged with vagrancy! Vagrancy, when I had eighty dollars in my pocket and a bank book showing $257 on deposit in the Gloversville Bank. I was taken to police Headquarters locked up over night, the next morning lined up before the detectives and orders were given to arrest me whenever they saw me!

Of course when arraigned in Jefferson Market Police Court I was discharged but it had added new disgrace to me and cost me $50 for a lawyer and expenses. In October 1907 I went into the restaurant business with R. Poppich at 155 Allen Street. As the place was a day and night Restaurant we changed hour's weekly. releaved from night work one day I went to collect a bill owed us in Av. A. near Sixth Street and returning was not a half block from the home of the man who had paid the bill befor I was arrested taken to headquarters, from there to court, charged with unlawful entry. Magistrate Butts on their false testimony and on my previous record held me for special Session's. In default of Bail I was com-

mitted to the Tombs prison. When tried I was discharged on the testimony of the man who had paid the bill at the verry time the supposed crime was beeing committed acording to the detectives. regaining my liberty I found my partner had sold the Restaurant, without my knowledge and left the City. again I lost $125 of hard earned money through this unwaranted arrest. While Boarding with Mr. &. Mrs Sneider (the same Family that took care of my boy) I made the acquaintance of a verry worthy woman a widow with two children who was verry good to my now sick little Boy. She and I decided to marry and establish a home. I bought out a Delicatessen and Lunch Room at 142 East 117 Str. and established a home in the same house. progressing verry nicely we intended to get married in February 1908 but on account of my Boy's sudden illness postponed ouer plan. the end of Febrary I received a threatening letter demanding $200 this I took to the police Station there was informed to go to police Headquarters. to me this ment self protection. never would I apeal to people who have tryed to ruin me who were the cause of me loosing over $150 and sufferings behind bars on two arrests without provocation.

the afternoon privious to my arrest in March 1908 I had decided to buy a revolver in a down town second hand Store. this remark I had made in presence of a frequent Patron of the place who said that he allso is going down town and would come along. I bought a revolver in a second hand store down town and seeing some other thing's I needed I bought a pair of pliers, a putty knife. It was lucky I did not buy some more tools though the friend with me called my attention to them as bargains. We then parted. After concluding everything down town and spending an houer or so with my sick boy at Mrs. Sneider's I set out for Home. In the subway Station at spring Str. while paying for my fare

I again seen this party entering and with the remark well, well, just in time I paid his fare. together we left the Station at 116 Street & Lenox Avenue and aproaching 117th Str. Kinsly and Dugan stepped out of a hallway and grabbed me leaving the other party unmolested took the things I had bought wrapped up from my pocket and while doing this a piece of black cloth was picked from the ground along side of me. this they said was in my pocket. I now recalled certain suspicious action's of my friend or rather acquaintance and I realized that he was a police "stool pigeon" and "framer." I was so incensed that I reached for him. He had deliberately entrapped me in an innocent proceeding that looked verry black. the next instant one of the detectives had laid me out with a black jack. I regained consciousnes in a Cell in 126th Str. Police Station and when I wanted to call a messenger to inform my friends of what had happened I found orders had been left to allow me communicate with no one. It was the old round again. Headquarters. Police Court and Tombs. I was charged with carrying concealed weapon and carrying Burglar's tools. Later a charge of Burglary was added. this was based on two allmost valueless stick pins taken from my muffler and necktye at the arrest.

At the hearring on the charge of Burglary I was lined up in Tombs Police court with six prisoners for identification. Among them I was the only one wearring a black Tie. the only one with a black overcoat and the shortest of all. I protested asking that the identification be held in Tombs prison. but in vain. the first (a women) came in and identified an Italian prisoner.

while this was going on detective Kinsly left the court room the doors were wide open and I seen a face looking through the opening between the door and door frame. the second a man came in and put his hand on me without looking at any one else. I could have proven my

innocent but fearing the arrest of the women I was engaged to I waived examination.
two days later Kinsly and Dugan came with a nother women and the verry man to whom Kinsly had pointed me out in police court, to the Tombs prison for Identification. I again was lined up and the women allso identified an Italian prisoner. walking to my cell Dugan pointed me out to the women and she in return said that I was the man. detective Dugan then tryed to besway Mr. Hanly Depputy Warden of Tomb prison to let the second identification stand beeing tried in Special sessions on the charge of carreing concealed weapon I was remanded for sentence. and within that same week allso arraigned in General session to plead to two indictments.
At the date sentence was pronounced in Special sessions the detective testified that the revolver taken from me was charged and produceing my previous record I received a six months sentence.
My little boy had grown worse and on the verry day I was brought into court he died asking for me the last words he said.
those who knew the circumstances secured a bondsman, a Mr. Zimmerman to go on my $1500 bond that I might attend his funeral but the District Attorney had my bond raised to $5000 more than Zimmerman could give. Pains behind my ear became unbearable from the blow I had received from the black jack. grief over the loss of my child, beeing even deprived to have the last look at him. sentenced on a misdominor and to serve it. six month's later to be tried on two fellony charges. the whole thing became more than I could bear and making a rasor ege knife from a spoon handle I cut my throat and wrist but in Bellvue Hospital they landded me back to life despite myself. Befor I was realy well I was taken back to the Tombs. yet in an unfit Physical condition I was sent to the penitentiary on the carrying

concealed weapon charge. there I was operated upon the Mastoid and without given a chance to escape transferred to Matteawan State hospital.

(Here follow a number of pages containing the Prisoner's observations and his experiences in Matteawan. They are omitted as not being germane to our present purpose.)

I was arrested at the door's of the Institution on the two indictments remaining in the district attorney's office and brought back to New York to be tried. there was another line up in headquarters befor the detectives and again they were told to arrest me whenever they saw me. the paprs required my return to the tombs and the taking of me to police headquarters was outside of the police authority.

When I was once more in the Tombs I found that my long stay in Matteawan had resulted in the complete dispersal of my defence against the two indictments. Rev. Dr. Radin the Rabbi who had taken an interest in my case and been at my bedside in Bellvue Hospital making an investigation was dead more than a year befor. the women to whom I have referred as buying those pins had sold my place over two year's ago, moved and was not to be found. She had placed in Dr. Radin's hand's the proof that the pins were bought, both of them for $3.75 trough witnesses, that were in the Store at the time of her purchase. Though my defence was gone and my witnesses not to be found, the pins, the mask, a fals but mute witnes the Revolver and at last the man who was induced by the detectives to identifi me in police court, all this was in the hand's of the district Attorney. But fortunately I had a chance to speak to the new assistant district Attorney who felt that the case against me was just what I have shown it to be and I was told that if I pled guilty I would be properly treated. this promise was kept and I was set free by Honable

Judge Swan and was told to go back to Europe within one month. My condition was pitiable funds, clothing, tools, money gone discharged pennyless from Matteawan, I went to the Volunteers of America in fourteenth Street to their bureau for just such as I. I found I must work for a month or six weeks for them befor I would be given tools and that in other ways the new start was made so difficult that I had more chance with my mechanical skill trying it alone so I thanked the official of the bureau and left. Walking all the way up to 117th Street I visited the block in which I had had my place of business when the two officers and the stool pigeon contrived the false charges against.

My place was in the hands of strangers and as I stood looking at it my eyes filled with tears.
the barber a few doors away recognized me and called me. he told me the whole story of how my little property had been disposed of during my imprisonment and when he heard all that had befallen me he was most sympathetic. I stayed all night and the next morning set out to look for work and got it but having no tools was compelled to work for less wages. less than a week later two men stopped me on 19th Street. I did not know them but they were central Office men and knew me. Having my employers tools and material in my hand they did not dare arrest me but in some way my employer found out my predicament and I lost my place. I went to the crimminal court Building to apeal to Honable. Judge Swan but was informed that his Honor was on vacation. I quickly got a nother position through a letter to the Cloak and Suit Manufacturrer protective association beeing taken by Mr. Ike Silverman into the work of the Fidelity Secret service buerau at $3 per day and expenses I had told him of my predicament but have promised to be honest, upright and faitful.
I worked without complaint against me or my work till

a change ocurred in the buerau which resulted in the release of nearly all its Staff. at the same time I have taken a side contract to repair during the evening two Automobiles, so that I may raise and make sufficient money to start for myself.
the beginning of October 1910 I was able to set up my own little business having saved my wages and bought tools and material I had many smal contracts. I did verry well and was accuated by two strong motives, first to show Dr. Lamb of Matteawan that he is not the Law, second to prove to Honbl. Judge Swan that I am worthy of the confidence his honor had placed in me by paroling me. I was compelled to hire help in my work it so increased but the detectives kept at thir hounding and one day I was humiliated by two of them befor my own men, I was compelled to go to Judge Swan and apeal to him. his Attendant brought me word that I should keep on doing what I am doing now and his honnor will take a hand in my behalf. on a nother ocasion I was met by Ditective Thalt who said "you will squeal" the next time you get to Matteawan you go there for good." I took a contract at 6-8 Doyer Str. where I lost so heavily trough irresponsible ownership that it nearly floored me. Work fell off owing to the winter season and in December I had to give up my place. just befor Christmas I went to Cincinnati to the home of my cousin to get him to back a contract offered to equip a large apartment House. But he could not do so in reddy cash and I returned to New York in January. the 15th of the same month I wrote a letter to a party asking to assist me to get with some Railroad Company. the 18th of January the party called at Mills Hotel where I was stopping and promised to place me. from that day till the day I reieved employment at my trade with the Interborough Railway Co. I have seen the paty dayly eccept Sunday the first of February I came from work to meet the party

trough whom I received my position at Mills Hotel and during the evening played a few games of Chess and at last joined a get up game of Checkers. I retired about 9.30 p. m. about 12 p m two detective's came to my rooms and arrested me took me with them to 45th Street befor two Chaffeurs.

"there is your man" said one of them they looked me over then I was taken to the front door of a house farther on One of the detectives went in leaving me with the other for about five minutes. He came out and said all right then both took me into the house and confronted me with a stranger who said

"thats the man"

Now I was hauled to police headquarters and charged with beeing a suspicious person. "arrested in 45th Street" In the morning I was araigned befor Magistate Oconor in 57th Street Court. there I was charged with "unlawful entry" and I was committed to the Tombs. the verry day I was to be tried in Special Session, I was taken to General Sessions Part I where I found I had been indicted for "Burglary in the second degree second offense"

Should it be possibl for me to obtain a feare trial by Judge and jury I will prove that I have absolutely no knowledge of the crime I am charged with."

Alfred V. Schitofsky.

The Stories of Various Witnesses.

Told in Affidavits.

Alfred V. Schwitofsky, being duly sworn, deposes and says: I am the defendant in the above entitled action. I was charged in and by the indictment preferred against me with the crime of burglary in the second degree and assault in the first degree as a second offence, and was brought on for trial before Hon. Thomas C. O'Sullivan, a Judge of this Court on or about the 1st day of June, 1911, and after such trial before the said judge and a jury, I was convicted, and thereafter I was sentenced to a term of imprisonment at States Prison for twenty years, which sentence I am now undergoing in the Clinton Prison at Dannemora, having been transferred to the said prison from the States Prison at Ossining.

Upon my trial it appeared that there was a scar upon my left wrist which was claimed to have been inflicted as a result of a struggle between one Frank Harold and myself on the 19th day of January, 1911, when it was claimed the said Frank Harold forcibly took hold of me and took from me a revolver, and in doing so it was claimed the said Frank Harold got hold of my left wrist and embedded his finger nails into my left wrist and scratched the same and tore the skin thereof.

Upon my trial there was exhibited to the jury scars upon my left wrist, and it was claimed and argued that those scars were the result of the struggle with Mr. Frank Harold, and as corroborative proof of my guilt.

I desire to state that the said scars on my left wrist were caused and brought about solely and exclusively by reason of the fact that I inflicted wounds upon my left

wrist about three years ago while confined in the City Prison awaiting trial, at which time I cut the inside portion of my left wrist with a sharpened spoon with a suicidal intent and severed the arteries of my left wrist and I was taken to the Bellevue Hospital where I received treatment for the same.

There are no scars on the outside portion of my left wrist and I have had the said wrist carefully examined under a microscope by Dr. Julius B. Ransom, the Prison Physician of Clinton Prison, who has stated to me as well as made an affidavit that there are no scars or evidences of any scars on the outer side of my left wrist. Upon my trial I was defended by Mr. William G. Kier and Walter H. Carpenter, Esq., both of whom were assigned to me by the Court; and no effort was made by my said counsel to establish the fact that the scars on the outside of my left wrist was the result of my own act, committed while intending to commit suicide some years ago, and no effort was made to establish that the person whom Frank Harold caught hold of, had cuts on the outside of the left wrist. I can only account for that, that in the hurry of my said trial, my said counsel omitted to prove those facts and I am now advised that the said facts were essential and if properly explained would probably have resulted differently.

In view of the foregoing facts, I ask that the Court take evidence in support of my motion for a new trial and with that end in view, I ask, under Subdivision 7 of Section 465 of the Code of Criminal Procedure, that my personal attendance be enforced, in order that I may give evidence on the subject.

ALFRED V. SCHWITOFSKY.

Sworn to before me this
21st day of December, 1911.
LANCE M. PARSONS,
(Seal) Notary Public.

AFFIDAVIT OF LEO GELSKY.

Leo Gelsky, being duly sworn, deposes and says: I am an inmate of the State Reformatory at Elmira, New York, my consecutive number being 20524.

I recall about 19th day of January, 1911, and the going to the residence of Theodore B. Dale at No. 71 West 45th Street, New York City, at about 9 o'clock that morning, with a companion whose name I decline to disclose. My said companion was admitted to Mr. Dale's house and he had in his possession a promissory note for $100, payable to me and signed by the said Dale, and a letter from me to Mr. Dale requesting him to pay the amount of the note to my companion. My reason for giving the note with the letter to my companion was that Mr. Dale had instructed his servants not to admit me to his house.

About five minutes after my companion had been admitted to Mr. Dale's house, he ran out of the front door by which he had entered, followed by Mr. Dale who cried "Stop thief," and caused a crowd to gather. In front of the hotel, and on the opposite side of the street from Mr. Dale's house and about 200 feet eastward, my companion was stopped by a chauffeur, who came from the taxicab starter's office on the sidewalk in front of the said hotel. The chauffeur held my companion until Mr. Dale came up, when my companion in Mr. Dale's presence accused him (Mr. Dale) of having attempted to commit ——— upon him, whereupon the chauffeur allowed my companion to go, and we went to 6th Avenue and left the neighborhood in a street car.

My companion left New York for the West in January, and I have not seen him since.

On or about the 24th day of January, 1911, I sent another messenger to Mr. Dale's house, demanding the $100 that was due me, and was arrested by Detective Talt, being arraigned before Magistrate O'Connor in the East

57th Street Police Court. From the Police Court I was taken to another room in the same building by a detective named Dungate, where I found Mr. Dale together with Detectives Talt, Browne and one other whose name I did not know.

In this room I was shown a photograph by Detective Dungate, which I was told had been identified by Mr. Dale as that of my companion who had entered Mr. Dale's house on the morning of about January 19th. I did not recognize the photograph, which was not that of my former companion, and I told Detective Dungate so. Afterward a Detective took me down to the police court prison, and on the way beat and kicked me, and told me that if I did not identify the photograph as that of the man they told me to, I would be more severely beaten, and he the Detective would see that I got fifteen years for attempting to blackmail Mr. Dale. I was frightened, and afterward answered "yes" to all questions put by Detective Browne and Talt after which Schwitofsky was arrested.

As a matter of fact I had never spoken to Schwitofsky but once in my life, on which occasion I played a game of checkers with him at the Mills Hotel in Rivington Street. He was not with me on the morning of about January 19th, when I went to West 45th Street with my aforementioned companion, who was admitted to Mr. Dale's house, and I had never seen him outside of the Mills Hotel until after he was arrested and charged with the alleged burglary at Mr. Dale's house.

In February, 1911, while in the Tombs prison, I made a full confession in writing to the Rev. Dr. Jacob Goldstein, the Jewish Chaplain of the Tombs, of the part I had played in bringing about the arrest of Schwitofsky and offered to do anything in my power to further the ends of justice in his case, aside from giving the name of my companion on the morning of about January 19th.

I also told my attorney, Neil Olcott, 2nd, of the wrong I had done Schwitofsky, and at my request Mr. Olcott wrote to Schwitofsky's attorney, informing him that I was anxious to give evidence in his client's favor. I was not called as a witness at Schwitofsky's trial, however.

I first met Mr. Dale one evening early in January, 1911, in a "penny arcade" on 14th Street, where he accosted me and offered to get me a job, asking me to meet him at 6th Avenue and 45th Street at 8 o'clock. I met him there and he invited me to his house, where he injured me severely in an attempt to commit a crime against nature upon me while I was asleep. It was as compensation for these injuries that he gave me the promissory note of $100, he having given me the sum of $5 in cash that same evening.

LEO GELSKY.

Sworn to before me this 28th
day of October, 1911.
ERNEST D. PRITCHARD,
Notary Public,
Chemung Co.,
New York State.

AFFIDAVIT OF FRANK HAROLD.

Frank Harold being duly sworn deposes and says: I am a chauffeur by occupation and am employed at No. 19 West 62nd Street, Borough of Manhattan, City of New York.

I recall the 19th day of January, 1911, and the seeing of a person whom I afterwards learned to be Theodore Dale of No. 71 West 45th Street, pursuing an unknown man through and along West 45th Street, which unknown man was carrying a revolver or pistol, which afterwards turned out to be loaded with two blank cartridges. The said unknown man and Mr. Dale were approaching the little booth occupied by me in the course

of my business as taxi-starter for the Hotel Webster, and I took hold of the unknown man, I wrenched the revolver from his hand and took possession of the same. That after what I heard from the unknown man, whom I caught as aforesaid, concerning Mr. Dale, I left the said man go.

The unknown man accused Mr. Dale of attempting to practice ——— upon him and this accusation was made in the presence and hearing of Mr. Dale, and the said Mr. Dale did not deny the accusation, and I thereupon let the said unknown man go.

In the struggle between the said unknown man and myself, I got hold of the wrist of the left hand of the said unknown man and my fingers scratched the left wrist, and tore the skin thereon slightly.

I am sure that the person whom I got hold of at the said time and place, bore marks of the struggle, particularly the said back or outside portion of the wrist were injured and the skin broken.

I took possession of, and retained the said revolver and blank cartridges, and took out the said blank cartridges and examined the same, and later in the morning of the said day, Detective Cousins, then attached to the 88th Street police station, arrived and questioned me about the case and I turned over to him the said revolver and blank cartridges separately.

I am sure that the man whom I caught and who was pursued by Mr. Dale, had marks on the back or outside of the wrist of his left hand.

I make this affidavit voluntarily.

FRANK HAROLD.

Sworn to before me this 9th
day of October, 1911.
B. A. CHISHOLM, No. 221,
Notary Public,
New York County.
(Seal.)

Affidavit of Edward J. Cousin.

Edward J. Cousin, being duly sworn, deposes and says: I am Acting Detective Sergeant, 1st Grade, of the Police Department of the City of New York, and am at present attached to the 35th Precinct, in the Borough of Manhattan, City of New York, as detective.

I recall the 19th day of January, 1911, and my being called to the house of one Theodore B. Dale, at 71 West 45th Street, Manhattan, between nine and ten o'clock in the morning of said 19th day of January, 1911, he having telephoned to the police station that an unknown man had gained access to his (Dale's) premises a short time before, on the pretext that he was a telephone repairer, and on being asked for his credentials had threatened him (Mr. Dale) and his servants with a pistol and had then run out of the house and escaped.

On arriving at Mr. Dale's house, I was informed by him that the unknown man had run eastwardly in the direction of Fifth Avenue and had been stopped in front of the Hotel Webster on the opposite side of 45th Street by a chauffeur who was a taxicab starter for the said hotel, and who had taken the pistol away from the said unknown man and then allowed him to escape.

I accordingly went to the taxicab starter's booth on the sidewalk in front of the Hotel Webster, and saw the chauffeur, whose name I afterward learned was Frank Harold, who had stopped the unknown man and taken his pistol away. Harold told me that he had allowed the unknown man to escape because he had informed him that this man, meaning Dale, wanted to ————.

Mr. Harold gave me the pistol he had taken from the unknown man and two blank cartridges that he said he had taken from the chambers of the pistol, which he told me had been otherwise unloaded.

I handed in the pistol, and the two blank cartridges separately, as Mr. Harold gave them to me, at the Property Clerk's office at Police Headquarters shortly afterward.

EDWARD J. COUSIN.

Sworn to before me this
16th day of October, 1911.
ROBERT A. GAY,
Notary Public,
(Seal) N. Y. Co. 416.

AFFIDAVIT OF J. B. RANSOM.

In the matter of the examination of Alfred B. Schwitofsky, No. 9693, a convict now confined in Clinton Prison, in the County of Clinton, State of New York, personally came before me, a Notary in and for the aforesaid county and state, Dr. B. Ransom, physician to Clinton Prison, and who, being duly sworn, declares that he has examined the above-named convict with a view to determining the presence of scars on the wrists of the aforesaid convict:

That he has carefully examined said convict and finds on the outer aspect of the left wrist, with palm upwards, some fine radiating, linear scars, to wit: one irregular scar one and three-eighth inches in length, one radiating one-half inch, and one horizontal scar one-half inch. That these scars were evidently made by a thin, sharp instrument, and are of long standing. Further, that there are no scars that, in his judgment, were made within one year, and that there are no scars on the back of the wrists or arms of the aforesaid convict.

He further declares that he has practiced medicine for the past thirty-one years, has been physician to Clinton

Prison since May 15, 1889, and that he has no interest directly or indirectly in the case of convict Schwitofsky.

J. B. Ransom,
Affiant's Signature.

Sworn to and subscribed before me this 27 day of Oct., 1911, and I hereby certify that the affiant is a practicing physician in good professional standing; that the contents of the above declaration were fully made known to him before swearing, and I have no interest, direct or indirect in this matter.

J. H. Signor,
(Seal) Notary Public.

Affidavit of Julius B. Ransom.

Julius B. Ransom being duly sworn, deposes and says: I am a physician and surgeon duly licensed to practice in the State of New York and have been a physician for the past 31 years.

I am the prison Physician for the Clinton Prison and have examined Alfred V. Schwitofsky, a convict now confined therein and is known as No. 9693.

That on the 16th day of November, 1911, I made an examination of both wrists of the said Alfred V. Schwitofsky by the aid of a microscope and from such examination I am able to state that the back of the wrists of the said Alfred V. Schwitofsky show no evidence of marks or scars thereon, and it is my opinion as such physician and surgeon, that if the skin upon the back of the wrist or wrists of the said Alfred V. Schwitofsky had been broken or lacerated, or in anywise injured, the same would be noticeable upon a microscopic examination, and the skin on the back of the wrist show evidence of the same.

I am further of the opinion that marks or scars as a

result of the breaking or laceration of the skin upon the wrists of a person would remain and be noticeable under a microscope for at least five years after the injury.

The said Alfred V. Schwitofsky has no injuries upon his wrists other than those mentioned in my former affidavit sworn to before me on October 27th, 1911.

JULIUS B. RANSOM.

Sworn to before me this
16 day of November, 1911.
J. H. SIGNOR,
(Seal) Notary Public.

The Judge's Story.

OPINION.

COURT OF GENERAL SESSIONS OF THE PEACE, CITY AND COUNTY OF NEW YORK.

"This is a motion for a new trial under sub-division 7, of Section 465, of the Code of Criminal Procedure.

"The defendant was indicted for burglary in the second degree and assault in the first degree, as second offenses. The indictment was filed February 9, 1911, and the defendant came to trial thereunder on June 1st, 1911.

"In support of the charge, the prosecution produced witnesses who testified substantially that on the morning of January 19th, 1911, the defendant rang the door-bell of the premises of 71 West 45th Street and demanded admission to the house, stating that he was in the employment of the Telephone Company and that he came to repair the telephone in the house. Having gained admission, he proceeded to the telephone booth with a coil of electric wire in his hand. Shortly thereafter, the proprietor of the establishment enquired of the defendant what he was doing there, to which he replied that he was from the New York Telephone Company; whereupon the proprietor requested the defendant to show his badge of employment, to which he replied, 'Here's my book of instruction.' The proprietor repeated his request for the badge and on the failure of the defendant to produce it, the proprietor, in the presence and hearing of several employees of the establishment and in the presence and hearing of the defendant, directed the telephone operator

to enquire of the Telephone Company whether anyone had been directed to repair the telephone; whereupon the defendant started to leave the establishment. The proprietor and several employees attempted to prevent his leaving by placing themselves between the defendant and the closed door. The testimony for the prosecution shows that the defendant, then taking a loaded revolver from his pocket, said, 'You won't let me out; you won't; I'll shoot you if you don't let me out,' and that as the defendant went toward the door, he levelled his revolver toward persons present and repeated his threat, 'You won't let me out; you won't? Well, I'll shoot you.' He then escaped and in the presence of the employees was chased by the proprietor through the street. The testimony shows that, at a short distance from the establishment, the defendant was held by a chauffeur until the complainant arrived. Thereupon the defendant charged that the complainant had attempted to kill him (defendant) and made other criminal charges against complainant. The chauffeur then released the defendant, who was followed by the complainant to a car on which the defendant escaped. About a fortnight thereafter, the defendant was placed under arrest by an officer of the Police Department, and was subsequently held for trial in this Court.

"The defendant's motion is based on alleged newly discovered evidence as to his identity, on the theory that certain scars on his wrist were relied upon to a material extent to prove his identity as the actual offender.

"On the People's case, four witnesses, three of them employees of the Dale establishment, and Dale, the proprietor, swore to the identity of the defendant. According to the testimony of Dale, the defendant was seen in the neighborhood of his establishment the day before. The three employees testified to their presence in the room on the occasion when it is alleged that the defendant

entered the house, went to the telephone and afterwards drew a loaded revolver upon them with a threat to shoot. All four witnesses declare that they recognized the defendant and were positive in their testimony as to his identity. On that branch of the case no other witnesses were called by the prosecution. On the cross-examination of Officer Brown, who made the arrest, he stated that having arrested defendant, he brought him to the chauffeur, who stopped and held a man who was running from the direction of the Dale establishment on the date of the alleged burglary.

"On the part of the defense, the defendant, on his direct-examination, declared that after his arrest he was taken by the police officer to the chauffeur, and that the officer said to the chauffeur, 'This is the man I was telephoning you about.' The defendant testified as follows: 'They looked me over, made me take off my hat; one chauffeur said, "Show me your left wrist," and then remarked, "Well, I guess that's the man."'

"On re-cross-examination, the attorney for the prosecution asked the defendant: 'Q. Now the reason the chauffeur wanted to look at your wrist was that, at the time he stopped you, your wrist was cut by his nail, wasn't it?' to which the defendant answered 'No.' Thereupon the District Attorney asked 'Q. Well, what did he want to look at your wrist for?' and the defendant answered: 'A. He wanted to look at my wrist and examined my wrist, and then shook his head.'

"Again, on redirect-examination, the attorney for the defendant asked him to repeat the statement made by the chauffeur, which was done.

"The Court instructed the defendant that he might make any explanation that he desired to make concerning the charge against him. The foreman of the jury questioned defendant about the scar on his wrist and asked him how he came by it. The defendant answered

that he inflicted the injury upon himself in the year 1908.

"After the closing arguments had been made and while the Court was charging the jury, he was interrupted by the defendant's counsel, who stated that defendant desired to make a statement to the jury regarding the mark on his arm; whereupon the Court asked if he desired to reopen the case, to which counsel answered that he did not, but that defendant desired to make a statement with regard to the mark on his wrist. The Court stated to counsel for defendant that the matter had already been gone into, and denied the request.

"Three of the affiants whose affidavits are a part of the moving papers were accessible at the time of the trial and their testimony could have been procured. I do not believe that any additional testimony by them would have changed the verdict of the jury; nor would testimony of the microscopic examination of the scars, three years after they were made, have that effect, particularly in view of the fact that the defendant testified that they were made by himself in 1908, which testimony was uncontradicted.

"In my opinion, the defendant was fairly tried. Two reliable and experienced attorneys were assigned to the defendant by the Court. They had ample time to acquaint themselves with every phase of the case, and I believe were familiar with all the facts and circumstances and could have adduced the testimony upon which it is now sought to obtain on a new trial. I regard the verdict as a just one. After a careful consideration of the moving papers and the minutes of the trial, I can find nothing to justify the granting of the motion, and, therefore, it is denied.

"Dated, New York City, February 23rd, 1912.

"THOMAS C. O'SULLIVAN,

"J. C. G. S."

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